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ACCESS TO UNIVERSITY EDUCATION BY LEARNERS WITH PHYSICAL DISABILITIES: COMBATING THE BARRIERS

Edwin O. Abuya

*Jane W. Githinji**

Mungu hakupi kilema akakosesha mwendo.¹

INTRODUCTION

All persons with disabilities have the right to full and equal enjoyment of all human rights and fundamental freedoms that the international human rights legal framework lays out. Despite this legal guarantee, the situation on the ground remains precarious. In the context of university education, learners with disabilities (LWDs) have encountered (and continue to encounter) numerous barriers. While there are guarantees to full participation and equality for persons with disabilities, experience suggests that they face discrimination and other violations of their rights and freedoms within the institutions that admit them. This situation is severe in developing countries, and the inaccessible environment is a huge impediment.² Those who are admitted into the university experience serious difficulties accessing the physical environment. As a result, many are unable to integrate fully in the university environment.

This situation is a major issue because access to university education is important to LWDs. In addition to gaining knowledge and

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1. Swahili proverb meaning: God does not give one a disability and simultaneously impede their advancement.

2. See, e.g., Abdreheman Abdella, *Instructors Willingness to Provide Instructional Accommodations for Students with Disabilities in Selected Universities in Ethiopia*, 22 INT'L J. INCLUSIVE EDUC. 671 (2018); John Charema, *Inclusive Education in Developing Countries in the Sub Saharan Africa: From Theory to Practice*, 25 INT'L J. SPECIAL EDUC. 87, 88-90 (2010); Suitbert Emil Lyakurwa, *Universal Design for Learning Towards Achieving Inclusive Higher Education in Tanzania* (Sept. 2018) (unpublished Ph.D. diss., University of Oslo).

experience, learning at this level enhances their chances of competing effectively for opportunities in the labor market.³ Further, university education could enable LWDs to lead a dignified life.⁴ As an empowerment right, education is a primary vehicle through which LWDs can avoid poverty and its undesirable consequences particularly in developing countries.⁵ Moreover, a decent education is a route through which LWDs can participate fully in their communities.⁶ It is for these reasons that the right to education is protected both at the international and domestic levels.

International law is emphatic that the right of education in general, and for LWDs in particular, must be guaranteed at all times. Beginning with the 1948 Universal Declaration of Human Rights (UDHR),⁷ subsequent treaties secure every person's right to education, including the 1976 International Covenant on Civil and Political Rights⁸ (ICCPR), International Covenant on Economic, Social and Cultural Rights⁹ (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women¹⁰ (CEDAW) and African (Banjul) Charter on Human and People' Rights (Banjul Charter).¹¹ In the context of LWDs, the Convention on the Rights of Persons with Disabilities (CRPD) contains a

3. See Bathseba M. Opini, *A Review of the Participation of Disabled Persons in the Labour Force: The Kenyan Context*, 25 *DISABILITY & SOC'Y J.* 271, 274 (2010); Odoch Daniel, *Barriers and Facilitators to Self-Employment of Persons with Disabilities in Gulu District, Uganda* (Nov. 2019) (unpublished Master of Special Needs diss., Kyambogo University).

4. Syed Salma Jameel, *Disability in the Context of Higher Education: Issues and Concerns in India*, 2 *ELEC. J. FOR INCLUSIVE EDUC.* 1, 8 (2011).

5. See General Comment No. 13: The Right to Education, U.N. Comm. on Econ., Soc., and Cultural Rts., art. 13, ¶ 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter General Comment No. 13].

6. See generally Emmanuel Sackey, *Disability and Political Participation in Ghana: An Alternative Perspective*, 17 *SCANDINAVIAN J. DISABILITY RSCH.* 366 (2015); Bhavisha Virendrakumar et al., *Disability Inclusion Elections in Africa: A Systematic Review of Published and Unpublished Literature*, 33 *DISABILITY & SOC'Y* 509 (2018).

7. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 26 (Dec. 10, 1948) [hereinafter UDHR].

8. International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (1967) [hereinafter ICCPR].

9. International Covenant on Economic, Social and Cultural Rights, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 (1967) [hereinafter ICESCR].

10. Convention on the Elimination of All Forms of Discrimination against Women, art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13 (1980).

11. African Charter on Human and Peoples' Rights, art. 17(1), June 27, 1981, 1520 U.N.T.S. 217 (1982) [hereinafter African Charter].

comprehensive protection framework.¹² In addition to this international framework, several countries have passed domestic legislation.¹³

Collectively, this corpus of law requires education providers to respect and promote the right of access to university education by all persons, including LWDs. Yet, access to an academic institution by itself is insufficient. In order to achieve the underlying legal obligation, all learners must be able to access the entire physical environment. Institutions must therefore provide all necessary tools, to ensure that LWDs, like other learners, may continue with their education journey uninterrupted. This obligation calls on universities to remove all barriers of access to education.¹⁴ The drafters of the CRPD were concerned that, despite various institutions and undertakings, LWDs continued to face barriers in their participation as equal members of society. Consequently, the Preamble to the treaty recognized the importance of accessibility to educational facilities as well as other types of facilities.¹⁵

Universities have a legal obligation to remove all physical barriers and obstacles preventing the full integration and participation of LWDs. This article focuses on the right to education for LWDs. It also considers measures that could be taken to ensure this right is implemented. Using Kenya as a case study, this article reviews the situation in select universities throughout the country. It emphasizes two arenas: the admission process and the learning environment. This focus on universities is important because universities are an under-researched area. Further, reviewing the record of universities is key because a university education is typically one of the final steps toward completing an individual's education. Considering the high level of unemployment

12. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S 3 (2008) [hereinafter CRPD].

13. See, e.g., Persons with Disabilities Act, 2010 (No. 10) (Tanz.); Public Health and Disability Act, 2000 (N.Z.); Discrimination Against Persons with Disabilities (Prohibition) Act, 2018 (Nigeria).

14. See UNESCO, *Guidelines for Inclusion; Ensuring Access to Education for All* (2005), <https://unesdoc.unesco.org/ark:/48223/pf0000140224> (May 24, 2020); Paul M. Gichana, *Challenges Facing the Implementation of Inclusive Education Programme in Public Primary Schools in Mombasa District of Kenya 15-25* (2009) (M.A. thesis, University of Nairobi) (on file with author).

15. CRPD, *supra* note 12, pmbl. ¶ v.

in Kenya,¹⁶ a university degree is a powerful tool to enhance one's prospects of securing formal employment.¹⁷

This article is divided into three sections. In order to gain a comprehensive understanding of an actual situation on the ground, the authors conducted fieldwork. They collected data in four Nairobi City County universities. Section one of this paper discusses further the methodology the authors deployed. LWDs in some Kenyan universities experience a myriad of challenges, namely concerning the admission requirements and the physical environment in which they find themselves. Section two evaluates these challenges. Section three identifies some of the steps that could be taken to mitigate these challenges, with a focus on three intervention measures: resource mobilization initiatives, advocacy on entitlements due to LWDs, and compliance with reasonable accommodation, a fundamental principle in disability studies. This section demonstrates the potential benefits of each intervention measure, and how they can guard against discrimination of LWDs. The article concludes by making specific recommendations, with a goal toward promoting the fundamental right to inclusive education.

I. METHODOLOGY

To what extent are universities in Kenya compliant with the legal requirements for access to education by LWDs? This is the central question, to which this article seeks to respond. It cannot purport to survey all 74 universities in the country.¹⁸ To do so would require several publications. Rather, this article focuses on four universities: University of Nairobi (UoN), Kenyatta University (KU), Daystar University (DU) and the United States International University (USIU). This article reviews the extent to which these learning institutions promote the right of education for LWDs. To put it in another way, to what extent have

16. See The World Bank, *Macro Poverty Outlook for Sub-Saharan Africa: Country-by-Country Analysis and Projections for the Developing World*, https://www.worldbank.org/en/publication/macro-poverty-outlook/mpo_ssa (Dec. 1, 2020).

17. See generally Fred Mwilima, *Employment Patterns of UNAM Graduates: An Assessment of the Employability of the Media Studies Graduates of the University of Namibia*, 4 GLOB. MEDIA J. 186 (2010); Rees Hughes & Kilemi Mwiria, *Kenya Women, Higher Education and the Labor Market*, 25 COMPAR. EDUC. 179 (1989).

18. For the list of all accredited universities, see http://www.cue.or.ke/images/phocadownload/Accredited_Universities_in_Kenya_November_2017.pdf (May 24, 2020).

universities removed barriers, which would otherwise make it extremely difficult for LWDs to learn with ease?

Granted, this article does not address the status in all universities in the country. The sample size (N=41) is also modest. In other words, the findings of this study are indicative, not conclusive. That said, the findings and recommendations of this study are useful because they are based on empirical work. Using field data, this piece contributes to the debate on inclusive education for all learners. It is hoped that the results of this work will sensitize interested parties on the rights owed to LWDs, and the challenges they face while in university. Further, it is hoped that this work will underline some of the measures that universities can take to remove barriers of access to education, which tend to exclude LWDs from educational systems of developing states such as Kenya.

The four institutions were chosen because of their proximity to the researchers—they were all in Nairobi City County. Further, of the institutions approached, these are the ones that were responsive. In addition, at the time of the survey, these universities were fully accredited by the regulator of University Education in Kenya—the Commission for University Education (CUE). The institutions represent both public (UoN and KU) and private (DU and USIU) universities. Forty-one research subjects were interviewed in 2013. All participants were male adults. The sample size comprised of LWDs (n= 25), university officials concerned with disability issues (n=13) as well as those from the Joint Admission Board (n=1) and the Higher Education Loans Board (n=1). The study sought to get their views on the following:

- (a) learning environment in the institution;
- (b) barriers they experienced;
- (c) measures that could be taken to address these; and
- (d) individuals responsible for taking these measures.

All interviewees were adults. An Interview Guide was deployed to collect views. Open-ended questions were used. Interviews were conducted in English or Swahili. Thus, there was no need for translators. The authors translated into English any interview conducted in Swahili. The idea was to elicit views from interviewees and encourage them to share their experiences. Structured questionnaires were also deployed. This tool offered a guided plan for interviewees. It also made it possible to ask interviewees similar questions. That said, room was left for interviewees to speak further about their experiences. More information was sought whenever participants raised useful points that needed further elaboration. Data was also collected by observing libraries, classrooms, and offices in the universities. Quotes in this article are reproduced verbatim. For confidentiality purposes pseudo names have

been used. Table One below is an overview of the interviews that were conducted.

Category of Interviewee	Number
LWDs	25
University Officials	14
Official from Joint Admission Board	1
Official from Higher Education Loans Board	1

Out of the students interviewed, eight were female (32%), while seventeen were male (68%). The students were selected using purposive sampling.¹⁹ Students were picked because they had the required characteristics, namely, a physical impairment. Other students' were selected using a snowballing method of sampling. Using this method, the selected students were able to introduce the researchers to other students. The latter would then be interviewed.

II. ACCESS TO UNIVERSITY EDUCATION FOR LWDs: COMPLIANCE OR DEFIANCE?

The right to education is fundamental to all LWDs. Access to university education, as mentioned earlier, has a wider impact on the lives and livelihoods of these learners. For this cohort to enjoy the right to university education, learning institutions are required to fulfill two basic requirements. In the first place they must ensure that LWDs have access to the institution. Once admitted, these institutions are obligated further to ensure that learning runs uninterrupted. This section examines the learning environment for LWDs in the four universities under review. For these institutions to meet their legal responsibilities they must not discriminate against any learner. In the context of LWDs all barriers of access to the institution must be removed. This category of

19. For a deeper discussion of this theme, see Benter Oseno Gudu, *Teaching Speaking Skills in English Language Using Classroom Activities in Secondary School Level in Eldoret Municipality*, 6 KENYA J. EDUC. & PRAC. 55 (2015); Beverly Ochieng et al., *Factors Influencing Mobilization of Kenyan Resources for Health and Development*, 3 INT'L J. SOC. SCIS. & EDUC. 128 (2012). For an overview of this mode of data collection, see Phoebe Kajubi et al., *Gay and Bisexual Men in Kampala*, 12 AIDS BEHAV. 492 (2008); S.O. Ayaya & F.O. Esamai, *Health Problems of Street Children in Eldoret, Kenya*, 78 EAST AFR. MED. J. 624 (2001).

learners should be “fully integrated”²⁰ into the life of the university. After examining the legal obligation owed to LWDs, the remainder of the discussion in this section focuses on actual practice. Are the needs of LWDs in the sample Kenyan universities met? To put it in another way, are the universities compliant with their legal obligations? This is the central question that is paused.

A. *Creating a Level Playing Field*

In Kenya, several pieces of legislation regulate the right of education. Commencing with the Constitution, Article 43 declares “every person” has the “right to education.”²¹ In addition to this general right, the Constitution has a specific framework that guarantees the rights of LWDs. Article 54(1) of the Constitution elaborates the rights and fundamental freedoms to LWDs. According to this article, LWDs are entitled:

- (a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;
- (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;
- (c) to reasonable access to all places, . . . ;
- (d) to use Sign language, Braille or other appropriate means of communication; and
- (e) to access materials and devices to overcome constraints arising from the person’s disability.²²

Emphasis is placed, first, on the principle of non-discrimination. Like any person, LWDs have the right to education. While relating this fundamental right to other entitlements, the Constitution reinforces the principle that these learners, as those without disabilities, should be treated with dignity and respect. As explained in the following part, this connection is vital in recognizing the right to education. Further, this Article of the Constitution fleshes the material contents of the right to education for LWDs. Breaking this entitlement into specific components is important in the sense that it identifies its key ingredients. These factors are useful assessment tools. One can use them to gauge compliance on the ground. Learning institutions, LWDs, and stakeholders can also deploy these criteria to monitor the actual realization of this right.

Kenya’s Constitution also has specific provisions outlawing discrimination. Article 10 outlines the national values and principles of

20. Speech by the Zambia representative, Mr. Simukwai, during the making of the CRPD. *See* U.N. GAOR, 32nd Sess., ¶ 88, A/C.3/32/SR.75 (Dec. 13, 1977).

21. KENYA CONST. art. 43.

22. *Id.* art. 54(1).

governance in the country; these include “human dignity, equity, social justice, inclusiveness, equality, . . . [and] non-discrimination.”²³ The Constitution also has an elaborate framework in Article 27 on equality and freedom from discrimination. Under the terms of Article 27, every person is equal before the law and has the right to equal protection and equal benefit of the law, and equality includes the full and equal enjoyment of all rights and fundamental freedoms.

Provisions of other legislation are consistent with the language and spirit of the Constitution. In addition to securing the right of LWDs to education, these statutes reinforce the non-discrimination prohibition. The Persons with Disabilities Act (PDA) guarantees the rights of LWDs to education in Section 18. While reiterating the positive and negative obligations (discussed in part one above), this section reads thus:

(1) No person or learning institution shall deny admission to a [LWD] to any course or study by reason only of such disability, if the person has ability to acquire substantial learning in that course.

(2) Learning institutions shall take into account the special needs of [LWDs] with respect to the entry requirements, pass marks, curriculum, examinations, auxiliary services, use of school facilities, class schedules, physical educational requirements and other similar considerations.²⁴

For universities, the Universities Act entrenches the norms of inclusive education as well as non-discrimination. According to its preamble, this legislation was designed “to make better provisions for the advancement of university education in Kenya.”²⁵ Incorporated in this statute as regulations are the founding legal instruments of a number of accredited universities in the country. These regulations contain provisions that seek to promote equal education for all learners.²⁶ Collectively, Kenya’s legal framework sets out two obligations—a positive and a negative obligation. Under the terms of the former, universities are required to take measures to ensure that they meet their duty to provide education to all LWDs. They must also refrain, under the

23. *Id.* art. 10(2)(b).

24. Persons with Disabilities Act, No. 14 (2003) KENYA GAZETTE SUPPLEMENT No. 111 § 18 [hereinafter PDA].

25. The Universities Act (2012) Cap. 210B (Kenya) [hereinafter Universities Act].

26. Daystar University, for example, declares that it will admit qualified students without regard to, among others, their “physical disability.” *See id.* at Charter to Establish Daystar University.

terms of the negative obligation, from any action that would frustrate realization of this entitlement.

Kenya's legal framework is consistent with its international counterpart. The rights and obligations contained domestically are reinforced at the international plane. As with the situation in Kenya, international legal provisions reiterate the fundamental right to education as well as the norms of non-discrimination and dignity for all learners. Article 24(1) of the CRPD requires universities to ensure LWDs enjoy the right to education at all times.²⁷ These institutions are also prohibited from discriminating against these learners.²⁸ This treaty requires them to guarantee to LWDs all the rights that are due to them. These provisions are designed to create a level playing ground for all learners. To this end, Articles 5 and 24(2)(c) of the CRPD require universities to take "reasonable accommodation" steps, as a way towards realizing the rights to inclusion, non-discrimination, and equality for LWDs.²⁹ These principles are fundamental to the enjoyment of the right to education.

What do the terms "discrimination" and "discrimination against LWDs" mean? It is important for us to understand the meanings of these terms. Otherwise how can one establish the extent to which an academic institution is complying with the obligations due to LWDs? The prohibition against discrimination is well-known. At the international level Article 2 of the UDHR declares that "[e]veryone is entitled to all the rights set forth in [the declaration] without distinction of any kind such as race, color, sex, language, religion, political or other opinion national or social origin, property, birth or other status."³⁰

Later international and regional treaties, including the ICESCR,³¹ ICCPR,³² and the African Charter,³³ have all emphasized this prohibition.

27. See CRPD, *supra* note 12, art. 24(1).

28. See *id.* art. 5(2).

29. See *id.* art 5, 24(2)(c).

30. UDHR, *supra* note 7, art. 2.

31. See ICESCR, *supra* note 9, art. 2(2) ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

32. See ICCPR, *supra* note 8, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

33. See African Charter, *supra* note 11, art. 2.

The concept of “other status,” which is contained in all these treaties, applies to discrimination on grounds of disability.³⁴ At a minimum, this requirement entails that nobody should be discriminated insofar as access to the rights in these treaties.³⁵ Any discrimination of a LWD is, therefore, a violation of his or her rights. At the regional level, the Commission on the African Charter on Peoples and Human Rights (Commission) in *Purohit and Moore v. The Gambia*³⁶ discussed this entitlement. While underscoring the need to eradicate discrimination in practice, the Commission observed that LWDs, like any other learner, have “hopes, dreams, and goals.”³⁷ These need to be safeguarded at all times.³⁸

Some writers have discussed the concept of discrimination against LWDs through offering examples. Ruth Bukola, for instance, defines this term to include denial of admission into and inaccessibility of the physical environment in academic institutions.³⁹ This approach may be narrow in the sense that it may exclude other discriminatory practices that LWDs continue to face. The perspective taken at the international level is a bit different. Rather than illustrations, the focus at this level has been placed on actions that would constitute discrimination and their potential outcomes. Both elements in this two-part test have to be satisfied in order for one to make a finding of discrimination based on disability. In its General Comment No. 5 of 1994, the U.N. Committee on Economic, Social and Cultural Rights (CESCR) defined disability-based-discrimination to include “[a]ny distinction, exclusion, restriction or preference or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment, or exercise of socio-economic, social or cultural rights.”⁴⁰

A similar definition exists in Article 2 of the CRPD. This treaty reiterates that same two-part test. Discrimination against LWDs under this article means “[a]ny distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic,

34. See General Comment No. 20, ESCOR, ¶ 15, E/C.12/GC/20 (July 2, 2009).

35. See General Comment No. 5, CESCR, ¶ 5, E/1995/22 (Dec. 9, 1994).

36. *Purohit and Moore v. The Gambia*, Communication 241/2001, Afr. Comm’n Hum. & Peoples’ Rhts. (May 15-29, 2003).

37. *Id.* ¶ 61.

38. *Id.*

39. Ruth Bukola, *The Right to Inclusive Education in Nigeria: Meeting the Needs and Challenges of Children with Disabilities*, 10 AFR. HUM. RTS. L.J. 457, 459 (2010) (discussing children with disabilities in Africa and their educational needs).

40. General Comment No. 5, *supra* note 35, ¶ 15.

social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”⁴¹ The phrase “reasonable accommodation” is key in the area of disability studies because it is a central tool in the realization of the right to education for LWDs. Owing to its importance, a significant amount of literature has been generated while exploring the meaning of this norm and its application in general and within specific settings. The next section of this article further discusses this principle. For now, it is important to note that this phrase, as the CRPD defines, means “[n]ecessary and appropriate modification and adjustments not imposing a disproportionate or undue burden where needed in a particular case, to ensure to [LWDs] the enjoyment or exercise on an equal basis with others of all human rights and freedoms.”⁴² In General Comment No. 20, the CESCR expounded further the concept of discrimination in the context of disability, as it focused on the concept of “reasonable accommodation.” According to the committee, “denial of reasonable accommodation” is a “prohibited form of discrimination on the basis of disability,”⁴³ which international and domestic laws prohibit.

Domestic laws in Kenya, as reflected by the Constitution and the PDA, also prohibit discrimination against LWDs as a way towards securing their legal protection. Article 3(2)(b)(f) of the Universities Act further provides that in the discharge of their functions, universities shall be guided by national values and principles of governance set out in Article 10 of the Constitution.⁴⁴ In that regard, these institutions must enhance the principles of equity and accessibility of the academic space. In keeping with legal considerations, they are also required to institutionalize and implement non-discriminatory practices. These are fundamental provisions. They are designed to achieve equality for LWDs. The aim of inclusive education is to change the environment to accommodate the needs of LWDs. To what extent have the sampled universities gone towards meeting this fundamental goal? The remainder of this section responds to this question.

B. Admission Requirements and Choice of Subjects

The study sought to establish whether universities had flexible entry requirements in regard to students with physical disabilities. For students with physical disabilities, the entry point was two points below the point set for other students.⁴⁵ This position is consistent with the fair

41. CRPD, *supra* note 12, art. 2.

42. *Id.*

43. General Comment No. 20, *supra* note 34, ¶ 28.

44. Universities Act, *supra* note 25, art. 3(2)(b)(f).

45. Interview with Morrison, JAB (July 11, 2013).

equality of opportunity principle in the theory of justice, which allows some form of preferential treatment.⁴⁶

Of the total number of students surveyed (N=48), just over one half (26/54%) were in the KU. This represented the largest number of students. In this institution, as with the rest, students with physical disabilities were required to be registered with the Directorate of Disability Services. While a number in the KU did list with the directorate, some had yet to register.⁴⁷ CUEA had the lowest number of students registered (3/6%). The UoN had 12 students (25%) who were distributed in the various campuses,⁴⁸ while the USIU had 10 students (21%).⁴⁹ Table 2 below captures the number of LWDs in the Universities sampled, as of the time of the research:

Table Two: Number of Students with Physical Disabilities	
Institution	Number of Students
UoN	9
KU	26
CUEA	3
USIU	10
TOTAL 48	

Fieldwork established that the underrepresentation in some of the universities is a result of physical barriers within these institutions. This finding is consistent with previous works.⁵⁰ Access-related challenges in these learning centers discouraged some students from applying. These constitute the first difficulty LWDs face. It explains the low enrollment in the CUEA, for example. According to Christopher from CUEA, access to the University facilities is key when deciding whether or not to enroll to that institution. He explained that “I am only able to survive in the University because my disability is not so severe. Any other student with severe disability would not survive at all.”⁵¹

As is the case with any service, prospective students usually conduct research on the institution before they enroll. For LWDs, unlike other learners, it is not only a question of the courses that are on offer. They also consider the services that an institution has in place for them. These

46. See JOHN RAWLS, *A THEORY OF JUSTICE* 53 (rev. ed. 1999).

47. Interview with Walter, Student (July 4, 2013).

48. Interview with Roselyn, University Official (Aug. 7, 2013).

49. Interview with Wilson, Dean’s Office Administrator (July 25, 2013).

50. See Joan Hanafin et al., *Including Young People with Disabilities: Assessment Challenges in Higher Education*, 54 *HIGHER EDUC. J.* 435, 436 (2007).

51. Interview with Christopher, Student (July 5, 2013).

are primary factors in the decision-making process. There is a close connection between services available for LWDs and student enrollment.⁵² While the sources from which they obtain information will vary, overall, potential students obtain data from a variety of sources—current or former students, online sources, members of staff at the institution, or from advertisements. Collectively, these sources contribute a great amount to the decision-making process. Armed with the necessary information on courses on offer as well as the learning environment, a prospective LWD will be better placed to decide on the career to pursue and in which institution to enroll. The more accessible an institution is, the higher the chances a LWD will consider enrolling. The converse is true—those institutions that are inaccessible tend to be less attractive.⁵³ LWDs are, consequently, excluded from these institutions of higher learning for non-academic reasons. Is this practice not discriminatory, considering that other students do not suffer discrimination, as defined by international and domestic laws, on the same basis? For other students, issues surrounding accessibility hardly occupy their minds. All they need to consider is, first, whether they qualify for a particular course and, second, whether they have sufficient resources to undertake the course.

LWDs do consider accessibility before applying to a university. Christopher and Henry of CUEA and UoN, respectively, affirm the point that the absence of an accessible learning environment can discourage a learner from joining an institution. In their words:

I would want to do my Master's at UoN but the University is even more inaccessible.⁵⁴

52. See Abdulfettah Muzemil, *Campus Physical Environment Accessibility for Persons with Disabilities in the Ethiopian Public Universities*, 5 INT'L J. MULTICULTURAL & MULTIRELIGIOUS UNDERSTANDING 286, 288 (2018) (drawing a connection between enrollment of LWDs in universities and the availability of “appropriate assistive devices”).

53. Research conducted in Scotland and Ghana posted similar results. See Eric Tudzi, John Bugri & Anthony Danso, *Experiences of Students with Disabilities in Inaccessible Built Environments: A Case Study of a Student with Mobility Impairment in a University in Ghana*, 22 SCANDINAVIAN J. DISABILITY RSCH. 116, 124 (2020); Teresa Tinklin & John Hall, *Getting Round Obstacles: Disabled Students Experiences in Education in Scotland*, 24 STUD. IN HIGHER EDUC. 183, 187 (1999).

54. Interview with Christopher, *supra* note 51.

Our choices are limited. I had applied to go to KU since I know the University is accessible. But the [Joint Admission Board] admitted me to UoN.⁵⁵

These narratives affirm the thesis that the physical environment limits career choices of LWDs. The number of LWDs enrolled at the various institutions underlines the connection between accessibility and registration. Of the two private universities, the USIU, which was more accessible to students with physical disabilities, had more students than CUEA. Similarly, of the two public Universities, KU was more accessible to students with physical disabilities and had more students compared to UoN.

Fieldwork also sought to establish whether student's choice of courses was restricted by the universities. These institutions, as underlined in the previous section, have a legal obligation to guarantee LWDs their rights to education. As the preamble to the CRPD underlines, LWDs should have "the freedom to make their own choices," as a way towards guaranteeing their "autonomy" and "independence."⁵⁶ One way of complying with this rule is to ensure student's choices of subjects are governed by their ability and their ability alone. A learner's disability should not be the determinant factor. The situation on the ground, however, paints a very different picture. According to Isabella of KU, in practice, unlike for other learners, there were restrictions on the choice of subjects for LWDs. She described how the JAB always restricts students with disabilities to do "special needs education. [I]nterfaculty transfer[s] are difficult and take a lifetime."⁵⁷

The majority (23/88%) of students interviewed in KU were in the School of Education. All were specializing in special needs education. When consulted about this issue, the JAB stated that the issue was being addressed. According to Morrison, an official of this agency, "[officials] refer the students to the school in which they want to do their course, and they then have a chance to decide whether it is possible for them to do the particular course that they have chosen."⁵⁸ The LWDs that this study met such as Isabella were of a different view to that held by this official. Legal requirements require universities not to restrict students' choice of courses. On the contrary, the selection process should be guided by one's grades, not non-academic considerations. Practices such as these are out of step with international and domestic standards on access to education by all. According to the social model of disability, barriers such as these,

55. Interview with Henry, Student (Aug. 18, 2013).

56. CRPD, *supra* note 12, pmb. ¶ n.

57. Interview with Isabella, Student (July 4, 2013).

58. Interview with Morrison, *supra* note 45.

which hinder students from taking one particular career path, should be removed.⁵⁹ Otherwise, LWDs will be warehoused in courses where others believe they belong. Ultimately, this not only affects their self-esteem, but it also limits the scope of professions that LWDs can pursue.

Some LWDs did enroll eventually into the sampled universities. Experience shows that they encountered several difficulties relating to access to facilities in these institutions. Maria of KU shared her experience, noting that “my first choice was UoN because my big brother [was] there and would be able to assist me. When I visited the school, my wheelchair could not fit in the lifts and office doors. There were no disability compliant toilets.”⁶⁰

Domestic and international laws require universities to facilitate access by LWDs to all facilities within the institution. Maria’s experience above suggests that, while the UoN has installed some basic facilities, it has yet to meet international standards on access to education by all. Meeting legal requirements requires an institution to create a suitable environment, which will enable LWDs to move unhindered within the institution.⁶¹ More needs to be done to ensure all learners are able to enjoy the basic right to education. Maria’s experience suggests that not all learners are treated equally, despite legal requirements. This practice is also against the social model of disability, which requires duty bearers to rearrange the learning environment to ensure that all learners are accommodated. Let us now examine the facilities in the surveyed universities.

C. Access to Physical Facilities

Physical facilities play a key role in the learning process of any institution. These facilities are the channels through which the learning process occurs. Several activities take place within these spaces, namely, learners receive instructions, they interact with their colleagues and faculty as well as non-teaching personnel, examinations are conducted, and learners are able to travel around the institution as well as gain access to research materials. Accessing these facilities, hence, becomes crucial for any learner. In order to meet the legal requirements, the

59. See Edmos Mtetwa, *Disability and the Challenge of Employment in Zimbabwe: A Social Protection Perspective*, 8 AFR. J. SOC. WORK 78, 82 (2018); Mwajabu Possi, *Gender and Education or People with Disabilities in Tanzania*, 3 UTAFITI 155, 167 (1996).

60. Interview with Maria, Student (July 19, 2013).

61. See Paseka Mosia & Tlakale Phasha, *Student Experience and Quality of Tertiary Education for Students with Disabilities in Lesotho*, 8 J. STUDENT AFFS. IN AFR. 13, 26 (2020) (contending LWDs have the “right to equitable access to education”).

university must ensure all facilities are not only within reach, but that all learners can access them with relative ease. In this part the paper examines the extent to which select facilities in the sampled universities complied with legal requirements for access to education by LWDs.

1. Offices, Classrooms and Hostels

As of the time of the research, all the universities were accredited by the Commission for University Education (CUE)—established under Section 4 of the Universities Act. Even so, issues surrounding accessibility by LWDs in these institutions was not one of the conditions they had to meet in order to be certified. The application process focused on a number of factors: courses on offer; staff (their number, qualifications, and temporary or permanent status); the student population; and contact details of the institution, resources, and physical facilities.⁶² In the context of physical facilities, these institutions were required to indicate whether they owned or leased out the land where the university was located.⁶³ Further, they had to give details of the structural nature of buildings on the university—whether the structures permanent or temporary.⁶⁴ Minimum standards are set by the Universities Act on the facilities an institution must have. These include lecture rooms and auditoriums as well as offices for faculty and non-teaching staff.⁶⁵ Where student housing is provided universities are required to provide kitchen, dining, and accommodation facilities.⁶⁶

Legislation seems to pay significant attention on issues relating to public safety and public health. While this is not problematic, our concern lies with legislation's silence on disability-related issues. These rules, to put another way, do not expressly provide for disability related standards. This is a huge limitation. The lack of mandatory language is troubling for it could give an institution, which does not take into account disability standards, an avenue to claim they have complied since they have met the minimum requirements. One of the net effects of such an assertion could be to compromise LWDs rights to education.

In her research on children with disabilities in Nigeria, Bukola argued denial of access to education includes physical barriers such as staircases to classrooms, offices, and hostels.⁶⁷ Such barriers, the author points out, amount to exclusion and discrimination on the basis of

62. See Universities Act, *supra* note 25, at First Schedule, Form ACC/CHE 1.

63. *Id.*

64. *Id.*

65. See *id.* at Second Schedule, § 5.

66. *Id.* at Second Schedule, § 6.

67. Bukola, *supra* note 39, at 459.

disability. Many students who were apart of this research complained of the difficulties they had accessing physical facilities in the institutions they attended. According to some, the amenities were hardly sufficient. Christopher from CUEA had experienced these barriers:

Most offices do not have ramps, the pathways also have stairs, and it's a case of inaccessibility in the whole University.⁶⁸

The social model of disability advocates for removal of barriers such as staircases—all buildings must be accessible. This is the route universities should follow, if they are to comply with legal requirements. Christopher's experience (above) underpins the frustration of LWDs, who are unable to enter a building unassisted because the architect or contractor preferred to install stairs instead of a ramp.

The Universities Act requires all “administrative offices” to be “conveniently accessible” to all.⁶⁹ Offices that are located on the ground floors are, generally speaking, relatively easy to reach. Most offices, however, are located in the upper floors of the university buildings. Accessing these offices is quite problematic to LWDs. Gilbert of UoN expressed an inability to “access most offices as they are upstairs.”⁷⁰ In an attempt to surmount this hurdle LWDs took matters into their own hands and in situations where there were no ramps or lifts in a building, the students sought alternative ways of reaching officials. Once they had reached the ground floor of a building some requested their colleagues to call the particular official they wanted to speak with. Edgar of KU and Christopher explained their plight in the following words:

I cannot access the offices of the Dean of my school. It's on 1st floor and there are no ramps or lifts. I have to send other students.⁷¹

It's a problem for me to access most offices. I have to get assistance from friends to go up the stairs.⁷²

If the official was located and was free, she or he had to come to the ground floor in order to serve the LWD. Clearly this arrangement, however noble it may seem at face value, is concerning. Joseph Milinga describes it as a “common” strategy LWDs deploy to surmount the “daily

68. Interview with Christopher, *supra* note 51.

69. *See* Universities Act, *supra* note 25, at Second Schedule, § 22(c).

70. Interview with Gilbert, Student (May 16, 2013).

71. Interview with Edgar, Student (Aug. 7, 2013).

72. Interview with Christopher, *supra* note 51.

learning difficulties.”⁷³ But how effective is this tool? In instances where there was no one to send upstairs one had very little choices—they would be compelled to wait until someone who was willing to be sent to come by. Of course the situation would be more complicated if the wrong official appeared or the official wanted to double-check their records upstairs. The idea of sending someone in itself is quite concerning. This state of affairs, in many ways, makes LWDs dependable on others for tasks they would otherwise have done themselves if proper adjustments to the physical environment had been made. Often it leads to the denial of basic human rights of LWDs. This practice is not only discriminatory, but it also lowers the self-esteem and self-confidence of LWDs who are forced to use others in order to access services. It is doubtful, further, whether this situation promotes the right of education of LWDs. Unlike other learners, LWDs end up wasting a lot of time since they are compelled to wait for officials to make their way downstairs to serve them. Students during interviews have expressed:

Where the policy is you be served from downstairs, it usually takes a lot of time.⁷⁴

The same policy exists here. The Office of the Registrar is inaccessible, and we are served from downstairs, it takes time though.⁷⁵

Walter, an official in KU, found himself solving issues of non-compliance:

I am now from solving an issue where the student was kept downstairs for too long before being served.⁷⁶

Clearly, this framework is less ideal. Rather than universities undertaking measures that will promote an all-inclusive learning environment, these sorts of arrangements tend to limit the full realization of the right of access to education. Eventually, they embarrass these learners and make them feel left out from the mainstream university environment. The net effect of this initiative is very disturbing. LWDs, unlike other learners, end up losing a lot of time in their quest to obtain services at the institutions. These experiences reinforce the thesis that such barriers should be removed altogether. Trying to find ways around them, as these narratives affirm, is not the correct path to take. Instead, academic institutions must find and

73. Joseph Milinga, *Educating Students with Disabilities in Inclusive Schools: Results from Two Schools in Tanzania*, 7 J. ADVOC., RES. & EDUC. 134, 141 (2016).

74. Interview with Isabella, *supra* note 57.

75. Interview with Lucy, Student (July 26, 2013).

76. Interview with Walter, *supra* note 47.

implement permanent solutions. Absent these, the rights of LWDs will continue to be undermined. To meet legal requirements, universities are required to facilitate access to all spaces by LWDs. A workable infrastructure must be deployed. Via this route, the limitations flagged could be reduced to an all-time low. This step could also promote the rights of equality and respect that are due to all learners.

Another possible route to find a lasting solution is broaching concerns on access to facilities with the university administration. Discussions in this context should focus on the role these institutions need to play in order to safeguard the right to education for LWDs. Taking a proactive role is also advantageous as it involves LWDs in the process of finding pragmatic solutions. This research established that indeed LWDs had in some instances taken steps geared towards improving the learning environment. Rather than wait for authorities to act on their own volitions, these learners went a step ahead to ventilate their concerns. Gabrielle from KU, for instance, raised the issue of inaccessibility of some of the lecture halls with the administration. This engagement yielded fruit:

Where classes are in an inaccessible building we complain and the classes are moved to an accessible place.⁷⁷

Although this is a commendable step, the question one needs to ask is whether the authorities have to be nudged in order to act. Should they not be proactive in their affairs? Considering that they are aware of these cohort of learners in their institutions, one would expect them to strive at all times to comply with their statutory obligations.

This research established that some of the university buildings were quite old. Compared to new facilities, these structures were designed without taking into consideration the special needs of LWDs. At the UoN main campus, for instance, there are several old buildings. In these facilities, most lecture halls were (and still are) accessible via staircase or lift only. The narratives below are informative of the challenges learners face in such circumstances:

I face many challenges as a result of accessing all places in the environment as it is.⁷⁸

At UoN, the compound has stairs everywhere. All hostels have stairs, and consideration should be given to converting one side of the stairs to ramps.⁷⁹

77. Interview with Gabrielle, Student (July 26, 2013).

78. Interview with Gilbert, *supra* note 70.

79. Interview with Isabella, *supra* note 57.

According to Suet Khoo and Lay Lee, requiring LWDs to climb several flights of stairs before they can reach their classrooms can be “physically challenging” and “daunting.”⁸⁰ Motseotsile Marumoagae suggests that installing a lift in multiple storied buildings “will be fundamental in increasing accessibility” for LWDs.⁸¹ However, installation of a lift is not an end in itself. The end is reached when a LWD is able to use the facility that has been installed. In order to meet the special needs of LWDs these lifts should be specially designed to accommodate wheelchairs. Narrow lifts are, therefore, inappropriate—they make it difficult for LWDs to access the buildings in which they have been installed.

Because of the inaccessible buildings, some LWDs avoided courses offered on the UoN main campus. Others end up dropping out altogether “because of failure to attend classes that are in the upper levels.”⁸² In many ways this explains the low numbers of students with physical disabilities that we came across on this campus. The coping method of avoidance, however, is not a solution. Those LWDs who needed to access offices located only on the main campus, unfortunately, had little choice. They had to find a way of surmounting these barriers. Failure to gain access to these offices had a negative impact on their learning. Barriers such as these have a drastic impact on the lives and livelihoods of LWDs. Rather than academic considerations, some of these learners, unlike their other colleagues, are forced to take into account access related issues when choosing courses or modules to undertake.

Institutions with new facilities posted positive responses. As research established, these were constructed while keeping LWDs in mind. Thus, in these setups one finds adequate lifts, ramps, and wide doors as well as disability compliant toilets. Interviewees in KU and USIU expressed satisfaction with the facilities, such as “apart from a few issues of access, I am comfortable at KU,”⁸³ and “I have no complains that arise from the school environment.”⁸⁴ At UoN’s Kikuyu and Parklands campuses attempts were made at addressing concerns relating to inaccessible buildings, which interviewees like Isabella and Gilbert (above) flagged. In these settings, ramps were installed

80. Suet L. Khoo et al., *The Role of the State Towards Employability of Malaysian PWDs-Myth and Reality?*, 6 INT’L J. SOC., BEHAV., EDUC., ECON., BUS. & INDUS. ENG’G. 1555, 1557 (2012).

81. Motseotsile Marumoagae, *Disability Discrimination and the Right of Disabled Persons to Access the Labour Market*, 15 POTCHEFSTROOM ELEC. L.J. 345, 347 (2012).

82. Mosia & Phasha, *supra* note 61, at 7.

83. Interview with Maria, *supra* note 60.

84. Interview with Lucy, *supra* note 75.

apparently to facilitate access to buildings by wheelchair users. Granted, this was a step in the right direction. If properly implemented, it would ameliorate some of the challenges relating to inaccessibility of buildings. The problem, however, lay in the design of the ramps. According to users, they were too steep, rendering them quite risky for use. Gilbert, a student based UoN Parklands Campus, affirmed this position when he stated that “[t]he ramps which are present are very steep. The University should contract with professionals, especially architects who know how to design a standard ramp for wheelchair and caliper users.”⁸⁵

As key stakeholders in the learning process, LWDs must be consulted in the construction of any facility on campus. The CRPD emphasizes this basic rule: LWDs “should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.”⁸⁶ This requirement is in line with the well-known disability slogan — “nothing about us without us.” In its 1975 Declaration on the Rights of Disabled Persons, the U.N. General Assembly called on all duty bearers to ensure that “at all stages of economic and social planning” the “special needs of disabled persons [are] taken into consideration.”⁸⁷ A similar call was repeated in 1990:

Persons with disabilities ... should be consulted in identifying obstacles to self-reliance. Expertise on how those obstacles could be removed or avoided by planning barrier-free environments can often be found in disabled person’s organizations. This resource should be fully utilized by involving these organizations in the planning process.⁸⁸

Consistent with the requirement to consult, as well as legal considerations on access to information, their views must be considered from start to finish.⁸⁹ To borrow the words of Mark Weber, “to achieve equality, the person with the disability must be the agent rather than the passive recipient of social interventions, the subject of the sentence

85. Interview with Gilbert, *supra* note 70.

86. CRPD, *supra* note 12, pmb. ¶ o.

87. Declaration on the Rights of Disabled Persons, G.A. Res. 3447(XXX), ¶ 8 (Dec. 9, 1975).

88. U.N. Secretary-General, *Implementation of the World Programme of Action Concerning Disabled Persons and the United Nations Decade of Disabled Persons*, ¶ 54, U.N. Doc. A/45/470 (Oct. 15, 1990).

89. This entitlement is well-known, both at the international and national levels. See KENYA CONST. art. 35; UDHR, *supra* note 7, art. 19; African Charter, *supra* note 11, art. 9.

rather than the object.”⁹⁰ This is a general rule that should apply to all projects designed to improve learning in any institution. Universities will be better placed to take “appropriate measures to make the [institution] more accessible” for LWDs via this route.⁹¹ Absent such engagements, there is a chance that any project would end up creating further problems instead of addressing the needs of the target population.⁹² Chrispas Nyombi and Alexander Kibandama argue persuasively that having buildings that are only accessible to able bodied people is a discriminatory practice.⁹³ All state facilities in Kenya are required under the terms of the 2009 Persons with Disabilities (Access to Employment Services and Facilities) Regulations to be accessible to all users.⁹⁴ Compliance with this rule mandates institutions to provide suitable ramps in all buildings.⁹⁵ Toilets, too, should be adapted to facilitate access by wheelchair users.⁹⁶ Applying these legal requirements to the UoN main campus example leads one to the conclusion that the old buildings were (and still are) non-compliant; they fall short of this basic rule.

The right to education for LWDs extends beyond the classroom environment. It is risky to focus on learning facilities alone. This view, which is quite narrow, has the potential of depriving LWDs from enjoying their full rights. For institutions, embracing this perspective would imply that their obligations do not extend beyond the teaching environment. This is a simplistic argument to run. Meeting legal obligations requires one to take a broad-based perspective. This approach entails scrutinizing all the facilities within an institution through a disability lens. How do LWDs access facilities within the university? The modes and methods which LWDs use to travel within the university must be interrogated. How do they move from one point to another in the institution? This is a

90. Mark Weber, *Disability Rights, Welfare Law*, 32 *CARDOZO L. REV.* 2483, 2487 (2011).

91. Sameerchand Pudaruth et al., *Forgotten, Excluded or Included? Students with Disabilities: A Case Study at the University of Mauritius*, 6 *AFR. J. DISABILITY* 1, 7 (2017).

92. Experience in other countries affirms this point. See Paul Emong & Lawrence Eron, *Disability Inclusion in Higher Education in Uganda: Status and Strategies*, 5 *AFR. J. DISABILITY* 1, 8 (2016); Christian Courtis, *Disability Rights in Latin America and International Cooperation*, 9 *SW. J. L. & TRADE AM.* 109 (2002).

93. Chrispas Nyombi & Alexander Kibandama, *Access to Education by Persons with Disabilities in Uganda's Education System*, 19 *E. AFR. J. PEACE & HUM. RTS.* 74, 92 (2013).

94. PDA, *supra* note 24, at Persons with Disabilities (Access to Employment, Services and Facilities) Regulations, 2009, ¶ 15.

95. *Id.*

96. *Id.*

critical question. It goes to the heart of ensuring LWDs enjoy their constitutional right to education. For those who reside in student halls of residence the central issue is how they are able to commute from these residences to other parts of the university. In compliance with the law some universities have provided internal transport. All students of KU, for example, had no mobility-related issues. According to Isabella, the university provided transport within campus: “There are always Tuk Tuks to pick us and take us to class or the library.”⁹⁷

Provision of local transportation is beneficial to LWDs. In addition to promoting the right to education, enterprises such as these go a long way towards ensuring they enjoy a bundle of other human rights. As the preamble to the CRPD reaffirms, all human rights are interdependent and interrelated.⁹⁸ Running an internal transport system primarily ensures that LWDs can reach all parts of the university, and thereby guarantee the freedom of movement.⁹⁹ The fact that they can do this with relative ease means that these learners are able to participate fully in the life of the university as well as associate with colleagues.¹⁰⁰ Further, providing transportation ensures that LWDs are able to reach lecture halls and other facilities in good time. Hence, they save a lot of time, which would otherwise have been spent traveling from their hostels, for instance, to these facilities. This in turn enhances their right to be treated equally.¹⁰¹ Furthermore, since the commute occurs in a secure space, this step secures the rights of LWDs to security¹⁰² and privacy.¹⁰³ Initiatives such as these contribute immensely towards the realization of the right of access to education by LWDs. Simply put, the provision of intra-university transportation is a legal obligation. It is not an option, as some contend.¹⁰⁴

However, not all universities complied with the legal requirement for provision of internal transportation. It was unfortunate that in these

97. Interview with Isabella, *supra* note 57.

98. See CRPD, *supra* note 12, pmb. ¶ c.

99. See KENYA CONST. art. 39; ICCPR, *supra* note 8, art. 12; African Charter, *supra* note 11, art. 12.

100. See KENYA CONST. art. 36; ICCPR, *supra* note 8, art. 12; African Charter, *supra* note 11, art. 10.

101. See KENYA CONST. art. 27; UDHR, *supra* note 7, art. 10; African Charter, *supra* note 11, art. 3.

102. See KENYA CONST. art. 29; ICCPR, *supra* note 8, art. 22; African Charter, *supra* note 11, art. 10.

103. See KENYA CONST. art. 31; ICCPR, *supra* note 8, art. 17.

104. See, e.g., Åke Grönlund et al., *Effective Use of Assistive Technologies for Inclusive Education in Developing Countries: Issues and Challenges From Two Case Studies*, 6 INT’L J. EDUC. & DEV. INFO. & COMMC’N TECH. 5, 14 (2010) (contending that LWDs “may also need transportation to get to school.”).

institutions such facilities were non-existent, contrary to legal requirements that LWDs, like any learner, should be able to access the entire learning environment. LWDs were compelled to find their way from one facility to the other. Owing to the lack of resources, many were forced to walk. All students from the UoN decried this situation. Indeed, the lack of internal transportation was a huge inconvenience. According to Henry, this seriously restricted his movement within the university:

If I have a class in the morning, I wait in main campus for the other class in the late afternoon. The distance to the hostels and back is too much for me. I haven't spotted anyone in a wheelchair here. It would be too much for them, as the place is not conducive My problem is distance from the halls to class. It's too far and there are stairs everywhere. At the end of the day I am too exhausted. The university needs to invest in a Tuk Tuk for the sake of all LWDs.¹⁰⁵

While section three of this article further evaluates this theme, what is important to note at this stage is that the failure to provide internal transportation negatively impacted the learning process.

Let us now examine accommodation facilities. These, too, are central components in the life of any learner, especially where an institution offers housing. Fulfilling legal requirements requires education providers to provide adequate accommodation to all learners in these instances.¹⁰⁶ The entire facility should be reachable with relative ease. Rooms, toilets, laundry rooms and showers must comply with this basic requirement. For LWDs, special consideration must be taken on board. Unaccommodating facilities are likely to have a negative impact on the learning process. Thus, the facilities must be specially designed to meet specific needs of LWDs. For instance, room allocation must be done in such a way as to not inconvenience LWDs. KU is an example of an institution that has complied with this fundamental rule. In this institution LWDs were housed in non-storied hostels. The idea behind this initiative is to guard against inconveniences associated usually with storied buildings. Maria, a student at this institution, affirmed the relative ease with which she was able to access her room, owing to its location and the steps taken to accommodate her needs. She stated, "I am comfortable in the hostel. There are disability compliant toilets. I cannot complain."¹⁰⁷

105. Interview with Henry, *supra* note 55.

106. *See, e.g.*, Universities Act, *supra* note 25, pt. VI.

107. Interview with Maria, *supra* note 60.

Even so, about a quarter (n=6) of the students interviewed expressed concerns with the set-up of halls of residence. According to Edgar:

The doors to the hostels are not wide enough for my wheelchair to pass through. The beds are too high. The room is too narrow for me to turn with my wheelchair. The track outside is cemented and the clothing line is inaccessible.¹⁰⁸

Facilities in UoN also attracted complaints from LWDs. Henry had this to say about his residence:

The hall where I am housed does not have a ground floor. It's a pain for me to go up the stairs every time.¹⁰⁹

Unlike the situation in public universities, in their private counterparts, these facilities are unavailable. Most students are not housed. They have to seek accommodation in private homes or hostels—usually located outside of the institution. Whereas some housing options are located within walking distance, others are not so close. This requires learners to commute by public or private means. Hostels located close to the universities presented few access problems to LWDs. By contrast, those that were far removed presented serious challenges. Unlike other learners who could walk or commute with relative ease, for LWDs the position was quite different. Contrary to the legal requirement that education facilities be accessible to all, LWDs faced serious challenges getting to school. CUEA, for instance, had no hostels on campus. Christopher underlined the challenges this situation presented:

There are no hostels within campus, they are a distance away and quite expensive for my case. I commute every day from a nearby town. I have raised an issue with the management on the need to have hostels within campus for [LWDs]. However, nothing has been done.¹¹⁰

Compliance with legal requirements requires the University Administration to hear and comprehensively address such concerns.

108. Interview with Edgar, *supra* note 71.

109. Interview with Henry, *supra* note 55.

110. Interview with Christopher, *supra* note 51.

2. Library Access

Access to education requires availability of facilities, including libraries.¹¹¹ The preamble to the CRPD provides that accessibility of the physical environment, including libraries, is important in enabling LWDs realize their right to education.¹¹² Generally speaking, these spaces provide learners with a quiet place to study or conduct research. Access to the library is, thus, very important to any student. For these spaces to be of use to LWDs they must be accessible. Access for this category of learners means they can gain entry into a library and retrieve any records that are held. The Universities Act recognizes this basic requirement. This legislation creates several obligations. First, all institutions are required to have “[a]cademic resources (including . . . library services . . .) appropriate to and adequate for the proposed academic programme or programmes to be conducted”¹¹³ Universities are further required to maintain these resources “on a long-term basis.”¹¹⁴ They must also demonstrate their library has sufficient capacity.¹¹⁵ Moreover, these spaces should be safe for all users.¹¹⁶

Despite these legal requirements, fieldwork established that these obligations were not always met. In several instances LWDs raised complaints concerning access to libraries and their accompanying facilities. According to some, these spaces were hard to reach. This state of affairs adversely affected the learning process. It also curtailed the future life prospects of LWDs. For Christopher of CUEA an inaccessible library affected schoolwork and grades:

The library was constructed one year ago. The lifts are still not functional. Commerce books are on the first floor. I have not been able to access the library for one year. The problem is that when the library was built, we were there. They could see us. We have complained about it and still it's like no one cares. I am now doing my project but I cannot access materials in the library and can only rely on the internet. This will affect the quality of my work. My assignments have to be given [at the same] time as those of other students. Yet I cannot access the first floor of the library where commerce books are. I can send the staff for the books but when I look at the content they are

111. See General Comment No. 13, *supra* note 5, ¶ 6(a).

112. See CRPD, *supra* note 12, pmb. ¶ v.

113. Universities Act, *supra* note 25, at Universities Rules, § 7(e). See *id.* at Second Schedule, § 5 (requiring all universities have a library in the Second Schedule).

114. *Id.*

115. See *id.* § 16(2)(b)(iii).

116. See *id.* at Second Schedule, §§ 13, 23.

not relevant. I need to be present at the shelf to choose the books that I want.¹¹⁷

The UoN's Parklands School of Law library was also inaccessible:

I cannot access the basement and first floor of the library. There are no ramps at the entrance. I have to rely on the assistance of other students to get to the library as there is no ramp at the entrance. The library staff convinced me that plans were underway to install a ramp and lift in the library. Two years down the line this is yet to be done.¹¹⁸

This partial inclusion constitutes exclusion. It is also a violation of the right of LWDs to education. In their research on access to library services by LWDs in Malawi (N=40), Aubrey Chaputula and Patrick Mapulanga contended that “failure to provide for the educational needs of students with disabilities means that these students are not able to attend classes, thus being indirectly discriminated against.”¹¹⁹ Institutional barriers such as these have a negative effect on the learning process. They negatively impact the ability of LWDs to perform well. Hanafin and others assert that since students are assessed under pressurized and demanding examination conditions, these barriers “get in the way of [the] performance” of LWDs.¹²⁰ It is unfortunate that in the CUEA example, although a lift had been constructed, it had yet to be commissioned one year later. This delayed the learning cycle of LWDs significantly. Placing LWDs in “mainstream classrooms,” without more, is insufficient to meet legal requirements for inclusive education.¹²¹

Section 18(2) of the PDA requires academic institutions to take expeditious steps to ensure that a level playing ground is created for all learners. Granted, CUEA recognized the one year delay.¹²² Even so, this acknowledgement is in itself sufficient. Meeting legal standards requires academic institutions to take real steps to ensure all learners have access to the library and its materials. All barriers for access to reading materials must be removed. A one year delay impairs the enjoyment of rights due to LWDs. This delay eventually leads to discrimination as

117. Interview with Christopher, *supra* note 51.

118. Interview with Gilbert, *supra* note 70.

119. Aubrey Chaputula & Patrick Mapulanga, *Provision of Library Services to People with Disabilities in Malawi*, 82 SOUTH AFR. J. LIBRARIES & INFO. SCIENCE 1, 9 (2016).

120. See Hanafin et al., *supra* note 50, at 440.

121. Estelle Swart et al., *Implementing Inclusive Education in South Africa: Teachers' Attitudes and Experiences*, 34 ACTA ACADEMICA 175, 183 (2002).

122. Interview with Wallace, University official (Aug. 23, 2013).

LWDs are excluded from accessing reading or research material. The Kenyan Court of Appeal (Waki, Makhandia and M'Inoti JJA) in *Ol Pejeta Ranching Limited v. David Wanjau Muhoro* argued that “discrimination takes place when two similarly circumstanced individuals are treated differently.”¹²³ Few would deny that the environment LWDs find themselves in amounts to discrimination on the basis of disability. This state of affairs is contrary to international¹²⁴ and domestic¹²⁵ laws prohibiting all forms of discrimination. It is a violation of the inherent dignity and worth of every human person.

The UoN Parklands campus example is also at odds with the law. Similar to the CUEA example, Gilbert's sentiments also underline the challenges LWDs face when they are unable to access academic material. Because they have to refer to these learning materials, they are forced to rely on third parties to assist them. These physical barriers render these students dependent on others. The undesirable consequences of this state of affairs has been evaluated above. According to George Ngundo, this state of affairs lowers their self-esteem.¹²⁶ Moreover, the fact that they have to rely on colleagues in order to access reading material is a violation of the right to dignity of LWDs, which articles 28 and 54(1)(a) of the Kenyan Constitution prohibit. As the Commission underlined in *Purohit*, LWDs are entitled to the right to dignity.¹²⁷ Consequently, as the social model of disability underlines, barriers such as these must be

123. *Ol Pejeta Ranching Limited v. David Wanjau Muhoro* (2017) eK.L.R. 26 (Kenya).

124. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, Dec. 21, 1965, 660 U.N.T.S. 195 (1965).

125. See KENYA CONST. art. 27:

(1) Every person is equal before the law and has the right to equal protection and benefit of the law . . .

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

126. George K. Ngundo, *Implementation of Inclusive Education in Kenyatta University, Kenya* (May 2012) (M.Ed. thesis, Kenyatta University).

127. General Comment No. 5, *supra* note 35, ¶ 61 (noting “Like any other human being, [LWDs] have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with them well established principle that all human beings are born free and equal in dignity and rights”).

removed. Unfortunately, the narratives above show reluctance by these institutions to recognize the urgency of implementing inclusive measures.

Other institutions under survey posted positive results. Results on the ground affirmed they complied with the legal standards. Indeed, this is a step in the right direction in terms of meeting obligations owed to LWDs. According to Maria, the library in KU was accessible. She explained, “I have no issue with the library. There are ramps at the entrance. The lifts are wide enough for my wheelchair to pass and turn. There is space for me to pass between the bookshelves.”¹²⁸ Gabrielle similarly expressed satisfaction with the library in USIU. She stated that “[t]he library entrance has ramps. The lifts are wide enough for users with wheelchairs to enter and turn. There are disability compliant toilets. The distance between the bookshelves is wide enough for wheelchair users.”¹²⁹

The CUEA library’s only issue was the lift not working. Notably, the three Universities had new buildings. These were constructed around 2010. For older universities like UoN steps had to be taken to modify the library to the Main Campus library to make it compliant. Towards this end, a ramp was installed at the entrance to facilitate access by wheelchair users. The problem with this building, however, lied in the fact that other facilities in it were not compliant. For instance, disability compliant toilets were (and are still) missing. Lifts, too, were narrow for wheelchair users. The fact that the building is not new is not a good reason. It cannot be used as an excuse by the university to shirk its legal obligations. The UoN must take practical measures to ensure compliance with the law.

How do LWDs reach the libraries? We need to appreciate the fact that the surveyed universities occupy large tracts of land. Their grounds are quite expansive. Accessing any building in these institutions often requires an individual to travel for long periods of time. Usually most people travel on foot. For LWDs, accessing buildings on campus can be a huge challenge. The complications, caused by lack of transportation, have been identified above. This calls for a deep interrogation of the manner in which LWDs are able to access libraries. A holistic perspective is necessary. Looking at access within the building alone is insufficient. We must also consider the processes that an institution has initiated to ensure LWDs arrive at these facilities. Article 20 of the CRPD requires universities to facilitate “the personal mobility of LWDs in the manner and at the time of their choice and at an affordable cost.” Compliance

128. Interview with Maria, *supra* note 60.

129. Interview with Gabrielle, *supra* note 77.

with this obligation requires us to take into account several factors, including the travel time spent by LWDs to reach the library from any other location within the university. The shorter the period is the more advantageous the situation will be for LWDs.

As noted earlier, access to the entire university space was a problem in many institutions. Apart from KU, where transport was provided, students in other universities had to find their own means. For Christopher (CUEA) and Henry (UoN), gaining access to the library was problematic:

The library is about 800m away from the classes. The pathways have staircases and are uneven. It's a pain to get to the library.¹³⁰

I cannot leave the hostels just to go to the library. The distance is too much for me.¹³¹

That all barriers of access must be removed cannot be emphasized. Meeting legal requirements calls on universities, which do not provide transportation, to take steps that will ensure LWDs are able to navigate the entire institution and navigate it with relative ease.¹³² The KU was an exception to this rule. Maria affirmed this state of affairs when she said, "I only need to call a driver of a Tuk Tuk. He will then drop me at the entrance of the library."¹³³ Provision of internal transportation is fundamental. It needs to be taken seriously by all universities. Library buildings should be convenient for all users. The KU situation, as explained by Maria, is commendable. This is the route other universities must take.

Failure to accord LWDs the requisite facilities leads to further problems. Because of these barriers many are forced to spend extra resources to access this important facility, unlike their non-disabled colleagues. Experiences of students affirmed this. Christopher of CUEA narrated how he was forced to spend extra resources: "Some environments may look normal to other people, but that uneven

130. Interview with Christopher, *supra* note 51.

131. Interview with Henry, *supra* note 55.

132. See Areikin Catherine, Experiences of Students with Disabilities Admitted Under Affirmative Action Scheme in Public Universities, Uganda: A Case of Two Public Universities (2019) (Masters of Special Needs Education diss., Kyambogo University) (contending internal "means of transporting students should always be present at a specific place in intervals, so that students can easily access it any time. If possible, the drivers should be given the students' timetable so that they know when the students are available for picking upon their demand").

133. Interview with Maria, *supra* note 60.

pavement, and that one step at the entrance to class causes a lot of damage to the wheelchair. I have to replace my wheel chair every year.”¹³⁴ While according to Gilbert, the unfavorable environment was traumatizing: “I take too much time to access the library and classes. This is so depressing, especially during exam time.”¹³⁵

These experiences are not only concerning, they are also less ideal. They affirm the thesis by the CRPD that despite the passage of local and international laws, LWDs “continue to face barriers in their participation as equal members of society and violations of their human rights.”¹³⁶ Failure to facilitate movement, as experiences by Gilbert and Christopher underscore, significantly curtails the enjoyment of the right to education. Further, Christopher’s experience especially highlights the additional costs some LWDs are compelled to bear, owing to failure on the part of the university to meet its legal obligations. Yet most LWDs have very limited resources. Many struggle to get by with their studies, as this research established. Thus, requiring them to spend additional resources is quite problematic. It is also inconsistent with the undertaking these institutions have made to guarantee education to LWDs. As Christopher points out, rather than take solid steps to address the “negative impact of poverty”¹³⁷ on LWDs, the universities are creating further problems to an already disadvantaged and stressed cohort of students. Simply put, the restricted access to library facilities amounts to exclusion and discrimination of LWDs in the educational facilities. The next section reviews examination arrangements.

3. Examination Arrangements

As part of the learning process students are usually assessed. Various assessment methods are deployed by universities in Kenya. Generally speaking, students are required to write an examination at the end of each semester.¹³⁸ This is in addition to a mid-term assessment that Instructors issue, which could be a sit-in or take-home test. The final grade for each unit is computed by adding the scores one obtains from the two tests. For one to attain an excellent grade, one must perform well in these tests. Institutions, on the other hand, have an obligation to provide all learners with the necessary tools that will ensure the assessment process runs smoothly, from start to finish. Section 18(2) of

134. Interview with Christopher, *supra* note 51.

135. Interview with Gilbert, *supra* note 70.

136. CRPD, *supra* note 12, pmb. ¶ k.

137. Interview with Christopher, *supra* note 51.

138. See Universities Act, *supra* note 25, at Charter for United States International University, § 5(1) (outlining conducting “examinations” as a function of the institution).

the PDA provides that “Learning institutions shall take into account the special needs of persons with disabilities with respect to the ... examinations.”¹³⁹ The Universities Act reiterates this obligation.¹⁴⁰ Against this background, we need to scrutinize the examination facilities to gauge the extent to which these are compliant with legal requirements. Have any steps been taken by the universities? If yes, which one(s)? How effective are the initiatives that have been taken? These are some of the questions that can be posed when determining inclusion of all learners within the learning environment.

Despite the legal requirements calling on universities to implement an objective examination system, the situation on the ground was quite different. For some, the examination process was a nightmare. Considering the emphasis placed on examinations, it is important for the administration to develop a satisfactory assessment framework. Unfortunately, some institutions failed to consider the special needs of LWDs. The following narratives are instructive:

If you have a disability that affects your speed, you are not given extra time during examinations. I personally have bladder problems, but I am not given extra time.¹⁴¹

The desks are too narrow and were designed for students with both hands. There is no space for me to write.¹⁴²

Complaints were also leveled with regards to access to examination rooms. Article 2 of the CRPD advocates for universal design of all facilities by service providers. To this end, universities must take into account the needs of all persons during the construction process.¹⁴³ All facilities need to be designed in a way that they can be used by all people, without need for adaptation or specialized design.¹⁴⁴ Hanafin and others

139. PDA, *supra* note 24, § 18(2).

140. *See* Universities Act, *supra* note 25, § 6(k) (requiring universities to maintain the standards for examinations).

141. Interview with Christopher, *supra* note 51.

142. Interview with Carlos, Student (July 12, 2013).

143. *See* Nurdin Mushule, *Universal Design of Transportation Systems: A Case Study of Access and Mobility of People with Disabilities at Selected Intersections in Dar Es Salaam*, 33 TANZANIA J. OF ENG'G & TECH. 48, 58 (2010) (LWDs need to be considered at the planning and design stages of [all] projects [in order] to provide . . . facilities that are accessible to [these students] and . . . the whole population).

144. Research conducted elsewhere posted similar results. *See, e.g.*, Alisha Braun & Augustina Naami, *Access to Higher Education in Ghana: Examining Experiences through the Lens of Students with Mobility Disabilities*, 66 INT'L J. OF DISABILITY, DEV. & EDUC. 1,16 (2019) (calling for university structures, which are “more fully aligned with the architectural principles of universal design”);

argue persuasively that LWDs often have to spend unnecessary time and energy in accessing inaccessible buildings.¹⁴⁵ Bridging this gap requires institutions to accommodate LWDs during the entire examination season. Treating a LWD as any other learner is clearly out of step with the legal requirements on inclusive education. Christopher of CUEA shared his experience: “This [special] consideration is not given during exams. If I need to go to the compliant restroom, it is a distance away and there are staircases on the way. Yet I do not get more time.”¹⁴⁶

These narratives demonstrate that a lot must be done in order to fulfill the legal requirements. They affirm the thesis by Edwards Kochung that “support systems” in Kenyan universities are lacking.¹⁴⁷ Failure by institutions to comply with the standards have drastic effects on the lives and livelihoods of LWDs. Unfortunately, the record of these institutions, as far as examination arrangements were concerned, were not good. Indeed, this status is at odds with several well-known fundamental rights—including life, dignity and education.

But not all institutions that were surveyed failed the legal test. In some, the special needs of LWDs were taken into consideration during examinations. In addition to providing the necessary facilities, additional time was allocated to learners. The overall objective was to ensure that LWDs have all the basic tools required to write an exam.¹⁴⁸ Steps such as these go a long way towards ensuring that a level playing ground is created for all learners. Walter of KU underlined the measures the institution had put in place to ensure students are accommodated during the examination process:

Any student with physical disabilities who needs extra time makes an application. The Registrar then refers him to the university physiotherapist. The physiotherapist decides the

Sagahutu Baptiste et al., *Physical Environment Barriers to School Attendance among Children with Disabilities in two Community Based Rehabilitation Centres in Rwanda*, 2 RWANDA J. HEALTH 10, 14 (2013) (advocating for “adaptive learning facilities for children with disabilities [that would] allow them to cope up with the learning environment and therefore increase their school attendance”).

145. See Hanafin et al., *supra* note 50, at 440.

146. Interview with Christopher, *supra* note 51.

147. Edward Kochung, *Role of Higher Education in Promoting Inclusive Education: Kenyan Perspective*, 2 J. OF EMERGING TRENDS IN EDUC. RES. AND POLY STUD. 144, 147-48 (2011).

148. This position is consistent with Kenya’s education policy on LWDs. See Republic of Kenya, *The National Special Needs Education Policy Framework* (2009) at 41, <http://www.gluk.ac.ke/down/specialneedseducationpolicy.pdf> (Oct. 11, 2020) (recognizing LWDs need more time to write exams).

extent of the disability and how much more time they require. This is because, unlike students with visual or hearing disabilities who can be given a blanket time, some students with physical disabilities do not need extra time.¹⁴⁹

In USIU, additional time was also granted on a case-by-case basis. One had to lodge a formal request. If accepted, one would be accorded more time to write their exam. Lucy confirmed this position: “I am always given extra time as I am slower than other students.”¹⁵⁰ This is a critical process, which other Universities could emulate in order to guard against breach of fundamental rights that Universities owe LWDs.

III. COMBATING THE BARRIERS: THREE KEY CONSIDERATIONS

During the drafting process of the CRPD, the UN Secretary General called on duty bearers to take steps to “remove the obstacles to participation in the physical environment.”¹⁵¹ As this article demonstrated in the preceding section, the physical environment in some Kenyan Universities were inaccessible. An accessible environment is one in which any person with impairment can function independently with minimum or no assistance.¹⁵² Some of the universities evaluated by this article were constructed with non-disabled students in mind.¹⁵³ The preceding analysis identified some systematic barriers that LWDs faced. Meeting the goal of inclusive education requires universities to address these. Otherwise, the rights of this cohort of learners would continue to be seriously curtailed. This section reviews some of the strategies that could be deployed to remove the barriers and obstacles to accessibility in these institutions. It focuses on three strategic areas—resource mobilization, advocacy, and compliance with the norm of reasonable accommodation. The overall objective of these measures is to curb discrimination.

149. Interview with Walter, *supra* note 47.

150. Interview with Lucy, *supra* note 75.

151. U.N. Secretary-General, *Monitoring of International Plans and Programmes of Action: Report of the Ad Hoc Open-Ended Working Group to Elaborate Standard Rules on the Equalization of Opportunities for Disabled Persons*, ¶ 74, E/CN.5/1993/5 (Nov. 11, 1992).

152. Martha Chalwe & Jeniffer Desleighde, *Globalizing Accessibility: Drawing on the Experiences of Developing Countries to Enable the Participation of Disabled People in Zambia*, 27 *DISABILITY & SOC'Y* 921 (2012).

153. This situation is not unique to Kenya. See Robert Chimedza, *Disability and Inclusive Education in Zimbabwe*, in *POLICY, EXPERIENCE, AND CHANGE: CROSS CULTURAL REFLECTIONS ON INCLUSIVE EDUCATION* 123, 123-30 (Len Barton & Felicity Armstrong eds., 2008).

A. Resource Mobilization and Utilization

Meeting the goal of inclusive education requires adequate investment. In its 2015 report on the situation in Kenya, the Committee on the Rights of Persons with Disabilities called on Government to “ensure that budgetary, technical and personal resources are available” at all times.¹⁵⁴ A similar obligation is placed on private universities. These institutions must commit adequate resources,¹⁵⁵ as a way towards ensuring that the infrastructure is “accessible to all students.”¹⁵⁶ Absent ample funding, it will be a huge challenge to “bring about a happy and plentiful life”¹⁵⁷ to LWDs. The goal of inclusive education must go beyond rhetoric. Words should be matched by action on the ground. In *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v. Association for the Physically Disabled of Kenya*, Justice Rika, of the Kenyan High Court, argued that the undertakings contained in statutes must be matched by actual “practice”¹⁵⁸ if real results are to be posted. Measures must be put in place to ensure that the objectives of the CRPD and the Kenyan Constitution are met. Article 2(2) of the ICESCR requires universities to apply the undertakings contained in this document “without discrimination ... of any kind.” In its interpretation of this article, the CESCR argued that, as a minimum, Governments are obligated to “ensure the right of access to public educational institutions and programmes on a non-discriminatory basis.”¹⁵⁹ Private institutions are not exempt from this requirement. According to the CESCR, the non-discrimination prohibition “[i]s subject neither to progressive realization nor the availability of resources. It applies fully and immediately to all

154. U.N. Comm. Rights of Person with Disabilities, *Concluding Observations on the Initial Report of Kenya*, ¶ 44, CRPD/C/KEN/CO/1 (Sept. 20, 2015).

155. See HCJ 4541/94 *Miller v. Minister of Defence* (1995) (Isr.); Anuwuli Ofuani, *The Right to Economic Empowerment of Persons with Disabilities in Nigeria: How Enabled*, 11 AFR. HUM. RIGHTS L. J. 639, 652 (2011).

156. Elizabeth Kamchedzera, *Access and Equity for Students with Disabilities at the University of Malawi: The Case of Chancellor College*, in KNOWLEDGE FOR A SUSTAINABLE WORLD: A SOUTHERN AFRICAN –NORDIC CONTRIBUTION 89 (Tor Halvorsen, Hilde Ibsen & Vyvienne M’kumbuzi eds., 2015).

157. U.N. General Assembly, *International Year for Disabled Persons: Note Verbale dated 20 April 1979 from the Permanent Mission of Viet Nam to the United Nations Addressed to the Secretary-General*, ¶ 9, A/34/209 (June 6, 1979).

158. *Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers v. Association for the Physically Disabled of Kenya* (2013) eK.L.R. (Kenya).

159. See General Comment 13, *supra* note 5, ¶ 57.

aspects of education and encompasses all internationally prohibited grounds of discrimination.”¹⁶⁰

In the context of LWDs, the PDA in section 11 obligates the Government to “take steps to the maximum of its available resources with a view to achieving the full realization of the rights of” LWDs. Kenya’s Constitution at article 20 reinforces this obligation. While recognizing the Government has resources, it places an obligation on it to allocate funds to various departments. In the exercise of this function, the State is required to “give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.”¹⁶¹

Laura Rothsein claims that universities would not be reluctant to subject “their discretionary budgets to judicial scrutiny, so they are unlikely to [invoke] the undue financial burden as a defense.”¹⁶² Contrary to this assertion, the position on the ground was quite different. In practice, issues surrounding the lack of resources were floated whenever LWDs complained about inadequate facilities with university administration. During an interview, a student said, “anytime I raise an issue of inaccessibility of the school environment, I am informed that the budget is closed.”¹⁶³ In Kenya, the Constitution has addressed this issue. It is no longer tenable for any Government agency to invoke lack of resources as a defense for failing to meet its legal obligations. The Constitution, in article 20(5)(a), places a burden on the duty bearer to demonstrate how it utilized its resources. Mere allegations cannot suffice. So, too, are “blanket” refusals to allocate resources.¹⁶⁴ Meeting the requirements of the Constitution requires additional proof. According to Judge Majanja of the High Court, in *Kenya Society for the Mentally Handicapped v. Attorney General and Others*, “a bland (sp) statement that persons with disability are not provided for adequately will not do. There must be some material basis for such an averment that will assist the court and the opposing side to deal with the issue.”¹⁶⁵

160. *Id.* ¶ 31.

161. See KENYA CONST. art. 20.

162. Laura Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 STETSON L. REV. 119, 126 (1997-98).

163. Interview with Christopher, *supra* note 51.

164. *Scott v. Telstra Corp. Ltd.*, ¶ 56 No. H95/34, H95/51.

165. *Kenya Society for the Mentally Handicapped v. Attorney General, et al.*, Petition No. 155A ¶ 15 (2011).

Meeting legal requirements requires an institution to fulfill three basic tests.¹⁶⁶ In the first place, they must produce a budget.¹⁶⁷ Details of the formula used to allocate resources to various units within the institution in a financial year must be availed.¹⁶⁸ This purpose is two-fold. First, a budget and the procedure for allocation of resources is a safeguard against arbitrary allocation of funds. Collectively, these tools affirm that there was a thought process by the institution in the allocation of resources. Additionally, they provide stakeholders with relevant information on the assets and liabilities located within the institution. These data are vital for planning. Moreover, these requirements ensure that there is equity in the allocation of resources within the cost centers of the university. The High Court in *Kenya Society for the Mentally Handicapped* castigated the petitioner for failing to make any “attempt to provide the context of the budget to enable the Court make the necessary assessments and determination.”¹⁶⁹ Further, universities are required to involve all stakeholders in the making of the budget. In other words, this process should not be undertaken by bureaucrats in the institution alone.

The Constitution underscores the value of this engagement in articles 10—underlining “participation of the people” as one of the national values of the country—and 201(a)—requiring “public participation in financial matters.” Courts have also emphasized this vital requirement. According to Justice Odunga of the High Court, in *Robert N. Gakuru and Others v. The Governor of Kiambu County and Others*, “public participation plays a central role in both legislative and policy functions of the Government whether at the National or County level. It applies to the processes of legislative enactment, financial management and planning and performance management.”¹⁷⁰ Moreover, a detailed narrative explaining the various funding allocations will have to accompany the financial plan. Reasons for any increase or decrease in spending on a particular item will have to be provided. Otherwise, the budget document remains incomplete.

166. *See id.*

167. *See* Universities Act, *supra* note 25, at Charter for Daystar University, § 30(1) (requiring the University Council, “four months before the commencement of a fiscal year,” to prepare “an annual budget of estimates of revenue and expenditure of the University for that year”).

168. *See id.* § 30(2) (requiring the budget to ‘make provision for all the estimated expenditure of the University for the fiscal year concerned).

169. *Id.* § 17.

170. *Gakuru et al. v. Governor of Kiambu County et al.*, Petition No. 532¶ 49 (2013).

Those who draw budgets must comply with these fundamental requirements.¹⁷¹ In Christopher's situation, whether or not the budget had closed, was immaterial. The institution, which bears the burden of proof,¹⁷² had to show that it had met its obligations to disclose the required data. These tests are consistent with the Universities Act. Rule 7(1)(e) of this statute places an obligation on universities to show:

[T]he academic resources (including finances, staff, library services and equipment) appropriate to and adequate for the proposed academic programme or programmes to be conducted at that university which have been or can be procured and the manner in which these will be maintained on a long term basis.

We need to remember that article 21(2) of the Constitution requires the Government to take measures "to achieve the progressive realization" of, among others, the right to education. Even so, the Constitution is silent on the minimum core content for enforcement of this entitlement. Section 11 of the PDA echoes this provision. It requires the Government "to take steps to the maximum of its available resources with a view to achieving the full realization of the rights" of LWDs. Kenya's Supreme Court has contributed to this debate. In *Matter of the Principle of Gender Representation in the National Assembly and the Senate*,¹⁷³ the court (Mutunga, Tunoi, Wanjala, Ojwang and Ndungu SCJJ) expressed its opinion on the question of realization of human rights. While drawing on international treaties, the majority (Tunoi, Wanjala, Ojwang and Ndungu SCJJ) interpreted the term "progressive realization" thus:

We believe that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, *a certain set of supportive measures are taken* by the State. The Exact shape of such measures will vary, depending on the *nature of the right in question*, as well as *the*

171. Courts in other countries have affirmed this basic requirement. *See, e.g., Nelson v. Thornburgh*, 567 F. Supp. 370, 382 (1983) (emphasizing balancing the "social costs" of exclusion versus the "modest cost of accommodation"); *Western Cape Forum for Intellectual Disability v. Government of the Republic of South Africa*, ¶ 26, No. 18678/2007 (Nov. 11, 2010) (requiring duty bearers to "spread the available funds fairly").

172. *See* Evidence Act § 107(1) (2012) (Kenya) ("Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.").

173. In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eK.L.R. (Kenya).

prevailing social, economic, cultural and political environment. Such supportive measures may involve *legislative, policy or programme* initiatives including *affirmative action* (emphasis in original).¹⁷⁴

The logic advanced by the majority of the Supreme Court in this decision is highly problematic. Doubtless, the court took a narrow view. While the enjoyment of human rights is immediate, the sentiments of the Supreme Court accord universities an excuse to claim that they are taking measures gradually to realize the right of education to LWDs. The results of failure to immediately remove barriers to access to education are tragic. These have been underlined by the preceding analysis. In its commentary on the right to education contained in article 13 of the ICESCR, the CESCR emphasized the urgent need for realization of this right:

31. The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.

...

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. 19 States parties have immediate obligations in relation to the right to education, such as the “guarantee” that the right “will be exercised without discrimination of any kind” (art. 2 [2]) and the obligation “to take steps” (art. 2 [1]) towards the full realization of article 13.20 Such steps must be “deliberate, concrete and targeted” towards the full realization of the right to education.¹⁷⁵

Article 10 of the Constitution outlines the national values and principles of governance for the country. These are the canons by which Kenya is to be governed. These canons include human dignity, inclusiveness, equality, and non-discrimination. Can these standards be realized gradually, as the majority of the Supreme Court contended in Matter of the Principle of Gender Representation in the National Assembly and the Senate? The answer to this question must be in the negative. Accepting such an interpretation, as the then Chief Judge and

174. *Id.* ¶ 53.

175. General Comment No. 13, *supra* note 5, ¶¶ 31, 43.

President of the Supreme Court, Justice Mutunga, underlined in his dissent in this case would amount to subverting these tenets.¹⁷⁶

Discrimination against LWDs should be eliminated immediately, not at a later stage.¹⁷⁷ The word “guarantee” affirms this point of view. According to the Limburg principles, article 2(2) of the ICESCR requires immediate application and involves explicit guarantee on behalf of the state parties.¹⁷⁸ Authors like Elizabeth Kamundia argue that obligations that are immediate in international law should also be held under domestic law.¹⁷⁹ There is no justification for introducing new legislation or administrative practices that are discriminatory.¹⁸⁰ Then Chief Judge and President of the Supreme Court, Mutunga, emphasized the removal of barriers to discrimination in his dissent in *Advisory Opinion No. 2 of 2012*, stating, “I see no reason a constitution that decrees non-discrimination would discriminate I see no constitutional basis for discrimination . . . as the consequence of the progressive realization [thesis].”¹⁸¹ To borrow the words of the Chief Justice, the right of LWDs to access university education “has to be immediately realized.”¹⁸²

It would be unrealistic to expect universities to use resources they do not have. We need also to be cognizant of the fact that institutions have finite resources. Measures that are taken should, therefore, comply with Section 2 of the CRPD. Accordingly, they should be, first, “reasonable” and, secondly, they should not impose an “undue and disproportionate burden” on the institutions. Under the terms of the *Universities Act*, these institutions must demonstrate that they have sufficient resources for the programs they run or intend to run. This condition requires universities to take stock of their resources. Toward this end, universities should refrain from embarking on courses that are beyond their resources in the sense that, among other requirements, do fulfill the needs of LWDs. A cost benefit analysis will, therefore, be

176. Matter of the Principle of Gender Representation, *supra* note 173, ¶ 11.6.

177. See MATHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE OF ITS DEVELOPMENT* 181 (1995).

178. Limburg Principles on the Implementation of the International Covenant on Social Economic and Cultural Rights, ¶ 35, <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (Feb. 10, 2020).

179. Elizabeth Kamundia, *Employment of Persons with Disabilities: A Critical Analysis of the Persons with Disabilities Act 2003*, 73 (LLM diss., UON, 2010).

180. CRAVEN, *supra* note 177, at 181.

181. General Comment No. 13, *supra* note 5, ¶ 11.5.

182. *Id.*

necessary. This exercise must take all circumstances into account.¹⁸³ Mary Crock, Christine Ernest, and Ron McCallum assert that, in cases of inaction by an institution, the question is also whether this was a result of a negative attitude.¹⁸⁴ Granted, measures such as adapting buildings to meet the needs of LWDs would require time and resources. Even so, these factors should not be used as an excuse.¹⁸⁵ Compliance with legal obligations calls on universities to provide a time-table specifying timelines for completion of such projects. Keeping a strict schedule will ensure these assignments are completed as originally planned.

Kenyan public universities are semi-autonomous, while private universities are completely autonomous insofar as finances are concerned. According to Walter, an official in KU: “The university does have a wide range of choices on how the money allocated as capitation by the Government and what is collected in terms of fees in the University is used.”¹⁸⁶ Private universities have wider latitude on resource allocation. Simon of CUEA confirmed this: “The budget is deliberated by the budget committee before being forwarded to the University Council for approval.”¹⁸⁷

The PDA provides for a fund, which a wide range of actors—including universities—can draw.¹⁸⁸ During our research, we established that, unfortunately, this fund is yet to be operationalized. It existed only on paper. Consequently, universities could not seek additional support from this reserve. Ideally, this should be an additional resource for universities. They should be able to tap into this resource, and, thereby, support projects geared towards enhancing access to education by LWDs.

183. Leticia Martel, *Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective*, 8 INT’L J. HUM. RIGHTS 85, 106 (2011).

184. Mary Crock et al., *Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities*, 24 INT’L J. REFUGEE L. 735, 753 (2013).

185. See Bernard Bekink & Mildred Bekink, *Children with Disabilities and the Right to Education: A Call for Action*, 16 STELLENBOSCH L. REV. 125, 134 (2005) (contending “the lack of resources should not negate the right to basic education”).

186. Interview with Walter, *supra* note 47.

187. Interview with Simon, Dean’s Office Administrator, CUEA (July 5, 2013).

188. See PDA, *supra* note 24, § 9(1).

B. *Advocacy on Entitlements and Obligations of LWDs*

A lot is needed in the area of awareness. Most people treat me like someone who always needs help and assistance, even when this is not the case.¹⁸⁹

To what extent is the university fraternity aware of the rights due to LWDs? This is a central question that needs to be asked when discussing the subject of inclusive education. Information, as they say, is power. Faculty and staff, as some contend, are not always aware of disabilities.¹⁹⁰ Maria's sentiments above underscore the value of creating awareness or engaging in advocacy within the university environment. This strategy was underlined at the drafting of the CRPD. According to Mr. Ng'eny, a Kenyan delegate, "a move to educate the Kenyan public on the plight of the disabled [had] been organized and [was] being carried out."¹⁹¹ Advocacy, as a strategy, is considered important within the legal provisions of the international human rights framework. Article 8 of the CRPD underlines the value of raising awareness in the learning environment. This provision requires state parties "to undertake to adopt immediate, effective, and appropriate measures" to "raise awareness" on the rights and obligations of LWDs as well as their "capabilities and contributions" and to "combat stereotypes." Article 8(2) proposes a number of measures, including:

- (a) Initiating and maintaining effective public awareness campaigns ... and
- (b) Fostering at all levels of the education system... an attitude of respect for the rights of [LWDs].

Advocacy—that is, educating the public about the rights due to LWDs as well as their obligations—is one form of enhancing the rights of LWDs. Primarily, this initiative recognizes that LWDs are within a particular academic community. This is an important preliminary step in the protection regime.¹⁹² Further, through these initiatives members are sensitized and appreciate the skills, rights, and obligations as well as their "capabilities, achievements, and contributions" of this cohort of its

189. Interview with Maria, *supra* note 60.

190. Elizabeth M. Dalton et al., *Inclusion, Universal Design and Universal Design for Learning in Higher Education: South Africa and the United States*, 8 AFR. J. DISABILITY 1, 6 (2019).

191. U.N. GAOR, 36th Sess., 89th Plen. Mtg., ¶ 331, U.N. Doc. A/36/PV.89 (Dec. 8, 1981).

192. Darlene Jones & Sony Miller, *Effectiveness of an Educational Module on Dental Hygiene Students*, 92 J. DENTAL HYGIENE 27, 28-29 (2018).

membership.¹⁹³ Many authors support this thesis. According to Regis Chireshe, Edward Rutondoki, and Paul Ojwang, there is a need to “sensitise able-bodied people” to guard against discrimination of LWDs.¹⁹⁴ Petra Engelbrecht and others describe advocacy as a key plunk in enhancing the rights of LWDs.¹⁹⁵ The drafting history of the CRPD demonstrates that the question of advocacy and its benefits were addressed. Mrs. Shahani, a representative of the Philippines at the forty-seventh UN General Assembly, held in October 1992, reported that information campaigns in the country led to “better appreciation of disability issues” in the country.¹⁹⁶

Furthermore, these information campaigns are important for developing support for change, which duty bearers must embark on for LWDs to overcome access-related barriers. The Canadian Supreme Court (Sopinka J) affirmed this position in *Brant County Board of Education and the Attorney General for Ontario v. Carol Eaton and Clayton Eaton*.¹⁹⁷ Courts in Hong Kong have also made the connection between knowledge and liability of a duty holder. In *M v. Secretary for Justice* Judge Lok of the District Court argued in the absence of knowledge of an individual’s disability a duty bearer cannot be held “liable.”¹⁹⁸ Moreover, awareness raising is key to creating an environment for accountability, participatory decision-making and ownership of projects geared towards inclusion of LWDs in all aspects of the academy. At the forty-seventh UN General Assembly session held in October 1992, Mr. Dayaratne (the representative for Sri Lanka), observed, owing to sensitization activities undertaken by the UN since 1982, “the plight and the potential of nearly 500 million disabled persons’ had been “brought to the fore.”¹⁹⁹ In order

193. Discrimination Against Persons with Disabilities (Prohibition) Act (2018) § 2 (Nigeria).

194. Regis Chireshe et al., *Perceptions of the Availability and Effectiveness of HIV/AIDS Awareness and the Intervention Programmes by People with Disabilities in Uganda*, 7 J. SOC. ASPECT OF HIV/AIDS 17, 22 (2010).

195. Petra Engelbrecht et al., *Parents’ Experiences of Their Rights in the Implementation of Inclusive Education in South Africa*, 26 SCH. PSYCHOL. INT’L 459, 459-60 (2005).

196. U.N. GAOR, 47th Plen. Mtg., at 41, U.N. Doc. A/47/PV.35 (Oct. 26, 1992).

197. *Eaton v. Brant County Bd. of Educ.*, [1997] 1 S.C.R. 241 (Can. Ont.) (According to the court, “[w]ith the change in attitude influenced by the Williston Report and other developments, the policy shifted to one which assessed the true characteristics of disabled persons with a view to accommodating them”).

198. See *M v. Secretary for Justice*, [2007] HKEC 1271, ¶ 211, 2007 WL 1824640, *39.

199. U.N. GAOR, 47th Sess., at 57, U.N. Doc. A/47/PV.34 (Oct. 23, 2001).

to be effective, LWDs must take an active role in these campaigns.²⁰⁰ Together with non-disabled colleagues,²⁰¹ they should craft plans and programs that seek to remove barriers to inclusive education. Strategies for monitoring compliance should also be formulated and followed through with.

Barriers to educational access may also include hurdles such as stigma, fear, disgust, disregard, and assumptions about an impaired person's inability to succeed.²⁰² Raising awareness is important to removing these prejudices, and at the same time safeguarding the right of LWDs to be treated with dignity. Isabella, a student at KU, confirmed attitude was an issue in the institution: "There is still so much to do regarding attitudes. Everyone needs to treat us like human beings."²⁰³ In their research on special education programs in Arab countries, Muna Hadidi and Jamal Khateeb contend that negative attitudes towards disability have a wider impact. This attitude not only "prevent[s] these persons from getting appropriate services, but also make[s] it very hard for them, and their families, to lead a normal life."²⁰⁴ Research in other parts of the world has drawn a similar conclusion. Roslinda Alias (and others) as well as Elizabeth Drame and Kaytie Kamphoff identified "negative attitudes" as one of the barriers for LWDs in universities in Malaysia²⁰⁵ and Senegal,²⁰⁶ respectively.

Courts have also addressed the fundamental question of attitude. The Australian High Court in *Alexander Purvis v. The State of New*

200. See generally Peter Rule & Taadi Modipa, *We Must Believe in Ourselves: Attitudes and Experiences of Adult Learners with Disabilities in KwaZulu-Natal, South Africa*, 62 ADULT EDUC. QUARTERLY 138 (2011); Stefanie Gregorius, *Exploring Narratives of Education: Disabled Young People's Experiences of Educational Institutions in Ghana*, 31 DISABILITY & SOC'Y 322 (2016).

201. See Universities Act, *supra* note 25, at Universities Rules, § 19 (encouraging states to develop training programs in consultation with organizations of LWDs).

202. ALISON HARRIS & SUE ENFIELD, DISABILITY, EQUALITY, AND HUMAN RIGHTS: A TRAINING MANUAL FOR DEVELOPMENT AND HUMANITARIAN ORGANISATIONS 11 (2003).

203. Interview with Isabella, *supra* note 57.

204. Muna Hadidi & Jamal Khateeb, *Special Education in Arab Countries: Current Challenges*, 62 INT'L J. DISABILITY DEV. & EDUC. 518, 519 (2015).

205. See Roslinda Alias et al., *Proposed Technology Solutions for Special Education Needs (SEN) Learners: Towards Inclusive Education in Malaysian Universities*, 3 INT'L J. INFO. & EDUC. TECH. 206, 207 (2013).

206. See Elizabeth Drame & Kaytie Kamphoff, *Perceptions of Disability and Access to Inclusive Education in West Africa: A Comparative Case Study in Dakar, Senegal*, 29 INT'L J. SPECIAL EDUC. 69, 78 (2014).

*Wales*²⁰⁷ underlined the value of disability awareness programs in an academic setting. While emphasizing the value of these initiatives, the court castigated the education facility for failing to provide instructors with disability awareness programs. According to the court, these steps would have led to avoiding stereotyping and assumptions.²⁰⁸ In some Kenyan universities, the administrations have taken steps to create awareness and, thereby, check these ills. Kenyatta University, for instance, has made progress to raise awareness. In the words of Anthony, the institution has: “a Disability Day in which the whole University community is sensitized on disability issues. Able bodied students are asked to use wheelchairs or blind folded in order to understand the situation of LWDs.”²⁰⁹

Initiatives such as these go a long way towards making able-bodied members of the university community conscious of the rights of LWDs as well as their obligations and talents. Some authors have criticized these initiatives. Kathy Livingston, for instance, claims that simulation exercises cannot make able bodied persons “understand fully” the daily experiences of LWDs.²¹⁰ Even so, these drills play a vital role in expanding the community’s knowledge of the situation of LWDs. In *Hills Grammar School v. Human Rights and Equal Opportunity Commission* the Australian Human Rights and Equal Opportunity Commission underlined the value of “direct experience of the needs” of LWDs.²¹¹ Likando Kalakula in his research on Zambia also contends that these exercises provide able-bodied individuals with “basic understanding” of the rights due to LWDs.²¹² He further writes that lessons taught by these experiences also “dispel the stigma and attitudinal barriers that exclude persons with disabilities from participating fully in society.”²¹³ Other universities should borrow lessons from the KU example. In addition to “bending” them to suit their needs, they should improve on these

207. *Purvis v. New South Wales (Dep’t of Educ. & Training)* [2003] HCA 62, ¶¶ 52-54 (Austl.). A number of authors have criticized this decision. See, e.g., Elizabeth Dickson, *Behavior: The Contrasting Approaches of Australia and the United States of America*, 13 AUSTRALIA & NEW ZEALAND J. L. & EDUC. 49 (2008).

208. *Purvis*, *supra* note 207, ¶ 52.

209. Interview with Anthony, University Official (July 19, 2013).

210. Kathy Livingston, *When Architecture Disables: Teaching Undergraduates to Perceive Ableism in the Built Environment*, 28 TEACHING SOCIOLOGY 182, 182 (2000).

211. *Hills Grammar Sch. v. Hum. Rts. & Equal Opportunities Comm’n*, [2000] FCA 658, ¶ 50 (Austl.).

212. Likando Kalakula, *Towards an Effective Litigation Strategy of Disability Rights: The Zambian Experience*, 1 AFR. DISABILITY RTS. YEARBOOK 165, 183 (2013).

213. *Id.*

experiences in order to ensure LWDs rights are respected, protected, and promoted at all times.

Other critics contend that simulation exercises do not deliver. Rather than promote the entitlements due to LWDs, they end up eroding these. According to Sally French:

At first glance simulating disabilities may appear to be a good idea, yet many disabled people and their organisations are convinced, not only that the practice does not work, but that it is positively harmful.²¹⁴

French further contends there is no empirical evidence these drills “bring about positive attitude change,”²¹⁵ and they “do not simulate the experience of disability.”²¹⁶ Moreover, she alleges these exercises provide “false information” to able bodied people.²¹⁷ These claims are difficult to sustain. French does not support her assertions with any hard evidence. There is hardly any proof to support the conviction claimed by “many disabled people and their organisations,” or that these exercises are “harmful.” French fails to give examples of commentators who hold these views. For these allegations to be persuasive, cogent evidence ought to be brought on board and evaluated. On the contrary, there is an adequate body of empirical evidence, that suggests these experiences are a valuable tool for changing negative attitudes towards LWDs. Data from Kenya,²¹⁸ Zambia,²¹⁹ and Senegal,²²⁰ affirm this point. Courts in Kenya and elsewhere²²¹ have underpinned the value of personal experiences. In the Kenyan case, *Paul Pkiach Anupa v. Attorney General*,²²² the High Court underpinned the value of personal experiences on the needs of LWDs. It is apparent that the practical experience gave the court a concrete understanding of the challenges persons with disabilities experienced when accessing the court. While drawing on this drill, Judge Majanja observed:

The current physical structure of the . . . courts is such that it is a hindrance to justice seekers owing to the physical barriers

214. Sally French, *Simulating Exercises in Disability Awareness Training: A Critique*, 7 *DISABILITY & SOC'Y* 257, 259 (1992).

215. *Id.*

216. *Id.* at 260.

217. *Id.*

218. See Nat'l Coordinating Agency for Population and Dev., *National Survey For Persons With Disabilities: Preliminary Report* 18 (2008).

219. Kalakula, *supra* note 212, at 189.

220. Drame & Kamphoff, *supra* note 206, at 78.

221. See, e.g., Hills Grammar Sch., *supra* note 211, ¶ 50.

222. *Paul Pkiach Anupa v. Attorney General* (2012) eK.L.R. (Kenya).

that make it a herculean task for persons with disabilities to access the courts. Some of the problems recognized are as follows:

- Access to the Entry Lobby of the Building is restrictive to people with wheel chairs since there is a step to the reception area.
- The witness boxes in various courts are raised by a platform of 200mm from the general floor which makes it difficult for the physically challenged particularly those on wheel chairs to access the stand.
- The parking bays are set at a lower level to the general ground which poses a challenge to move to the raised ground over the concrete stone.
- Some of the entrances to the court rooms are not wide enough for wheel chairs.

Access to the courtrooms that [are] located on the third floor is particularly limited to persons with disabilities [T]here was no ramp to ease access. In order to get to the fourth floor court, one has to use the narrow fire escape stairs. It is clear that the fire escape is not intended for persons with disabilities!²²³

Clearly, the data the court gathered from this concrete example was tangible, not “false,” as French asserts. Based on these findings, the Anupa court concluded there was a violation. It was also able to flag practical steps that could be taken by way of adjustments to meet the rights due to persons with disabilities. These real-life experiences are of great use. While drawing on his personal involvement, Frances Owusu-Ansah supports this conclusion.²²⁴ These involvements, he asserts, provide “occasions for deep and personal introspection, reappraisal of own values, and opportunities for self-transcendence.”²²⁵

The success of inclusive education will largely depend on aggressive sensitization campaigns.²²⁶ This task is huge. It cannot be left on

223. *Id.* at 12.

224. Frances Owusu-Ansah, *Sharing in the Life of the Person with Disability: A Ghanaian Perspective*, 4 AFR. J. DISABILITY 1, 2 (2015).

225. *Id.* at 2.

226. See Mariana Mohamed Osman et al., *Barrier-Free Campus: University Malaya, Kuala Lumpur*, 168 PROCEDIA-SOC. & BEHAV. SCI. 134, 143 (2015) (“[T]he awareness and sensitivity towards the provision of barrier-free facilities in the campus area should be fair and square so that all disabled students can enjoy their campus life as a student without having difficulties”).

Government alone.²²⁷ All stakeholders in the education sector and LWDs²²⁸ must come on board the implementation regime. Their expertise must be harnessed to ensure LWDs are included in all aspects of the University environment.

C. *Adherence to the Reasonable Accommodation Rule*

Article 24 of the CRPD recognizes that reasonable accommodation is necessary to eliminate discrimination as well as ensure equality inclusion of LWDs in the academic community. Kenya's legal framework embodies this cardinal principle. The PDA in section 18(2) contains an obligation of reasonable accommodation to all learners. Towards this end, learning facilities are required to:

[T]ake into account the special needs of persons with disabilities with respect to the entry requirements, pass marks, curriculum, examinations, auxilliary services, use of school facilities, class schedules, physical education requirements and other similar considerations.

Reasonable accommodation for LWDs requires universities—public and private—to directly remove barriers to education.²²⁹ The objective of this norm is to “achieve substantive equality and prevent discrimination against” LWDs.²³⁰ Under the terms of this duty, as the U.N. Committee on the Rights of Persons With Disabilities emphasized in *Szilvia Nyusti and Péter Takács v. Hungary*, these institutions are also required to take steps to “prevent similar violations in the future.”²³¹ The measures that

227. See Lucy E. Akinyi, An Assessment of the Efficiency in the Provision of Inclusive Education in Public Secondary Schools in Rongo District, Migori County Kenya (Sep. 17, 2012) (M.Ed. thesis, Kenyatta University) (“The community which includes parents should be sensitized on [their] role in ensuring success of inclusive education”).

228. See C. Jonah Eleweke, *A Review of Issues in Deaf Education Under Nigeria's 6-3-3-4 Education System*, 7 J. DEAF STUDIES & DEAF EDUC. 74, 81 (2002) (suggesting “[a]dvocacy organisations of and for [LWDs] in the country should strive to become more active to exert sufficient pressure on the Government to take the needs of [LWDs] into consideration in policy formulation and in the passing and implementation of relevant laws”).

229. See Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. ENT. & TECH. L. 363, 365 (2008) (arguing “In the area of education, both public and private institutions of higher learning have the obligation to be accessible to and provide reasonable accommodations to students with disabilities.”).

230. *Standard Bank South Africa v. The Commission for Conciliation, Mediation and Arbitration*, 2007, SA 1 (LC) at 28, ¶ 77 (S. Afr.).

231. Comm. on the Rights of Persons With Disabilities, at 14, U.N. Doc. CRPD/C/9/1/2010 (2010).

are taken must be effective. Courts have underlined this basic rule. Writing for the Irish Supreme Court, Justice MacMenamin argued that meeting the terms of the positive obligation required universities:

[T]o ensure that *all* practicable steps are taken. This is different from refraining or abstaining from doing something. The legislative object therein should be seen as to do everything that is reasonable and practicable, both procedurally, and in substance, ensures the treatment of a person with a disability is placed at the same level as a person without a disability. The obligation is not, therefore, simply to refrain from certain actions, but, where necessary, to engage in positive action. In colloquial terms, it can impose a duty to “go the extra mile.”²³²

Justice Breyer of the U.S. Supreme Court also underlined in *U.S. Airways Inc. v. Barnett* that “an *ineffective* ‘modification’ or ‘adjustment’ will not *accommodate* a disabled individual’s limitations.”²³³

Universities must make adjustments, for LWDs, to all spaces, within the institution, so that LWDs may “fully participate in the everyday activities in the mainstream classroom.”²³⁴ Failure to do so amounts to discrimination on the basis of disability. Reasonable accommodations for LWDs, guarantees equality, non-discrimination, and inclusion. According to *Purvis*, the objective, of these measures, should be to achieve “real — not notional — equality.”²³⁵ Courts, in other countries, have expressed similar sentiments. For instance, in *Eaton*, the Canadian Supreme Court emphasized the value of duty bearers taking tangible, not superficial, measures. According to Justice Sopinka:

[I]t is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses “the attribution of stereotypical characteristics” reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability

232. *Kim Cahill v. The Minister for Education and Science* (2018) 2 IR 417, 453 (Ir.).

233. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002).

234. Patra Engelbrecht et al., *The Idealism of Education Policies and the Realities in Schools: The Implementation of Inclusive Education in South Africa*, INT’L J. INCLUSIVE EDUC. 1, 11 (2015).

235. *Purvis*, *supra* note 207, ¶ 86.

and forces the individual to sink or swim within the mainstream environment.²³⁶

The obligation, to provide reasonable accommodations, is a central plank in the realization of rights for LWDs.

Providing reasonable accommodations presupposes the provision of what is practicably achievable within an educational institution. This is based upon the resources available and not impractical changes. According to the U.S. Court of Appeals, 9th Circuit, in *Sherrie Lynn Zukle v. The Regents of the University of California*, an “educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.”²³⁷ Courts have fleshed out the legal obligation, which this principle establishes. In an Australian case, *Hills Grammar School v. Human Rights and Equal Opportunity Commission*,²³⁸ the school claimed it was unable to accommodate a student with a physical disability.²³⁹ The school alleged that making these accommodations would require extensive renovations to the school buildings and pathways.²⁴⁰ The institution claimed that they lacked resources to make these accommodations, which is why they refused to admit the student.²⁴¹ Justice Tamberlin, of the Federal Court of Australia, rejected this argument. Justice Tamberlin found that the line, between reasonable accommodations and unjustified hardships, was unclear.²⁴² The process required a comprehensive process of weighing indeterminate and largely independent factors and making value judgments, which required balancing the benefits and detriments between the parties.²⁴³ In *Purvis*, the High Court of Australia emphasized that in all instances the educational experience of the LWD is key.²⁴⁴ This is the most important consideration in determining whether the costs of any accommodation are reasonable or whether it may cause unjustified hardship.

The test for reasonable accommodation is subjective. There is no one-size-fits-all perspective. Each case will have to be evaluated on its

236. Eaton, *supra* note 197, at 272-73.

237. *Zukle v. Regents of Univ. of Cali.*, 166 F.3d 1041, 1046 (9th Cir. 1999). See also *Se. Cmty. Coll. v. Davies*, 442 U.S. 379, 409 (1979) (“[I]t also is reasonably clear that [the law] does not encompass the kind of curricular changes that would be necessary to accommodate respondent in nursing program”).

238. *Hills Grammar Sch.*, *supra* note 211, ¶ 5.

239. *Id.* ¶ 5.

240. *Id.*

241. *Id.*

242. *Id.* ¶ 31.

243. *Id.*

244. *Purvis*, *supra* note 207, ¶ 86.

own merits. The United States case of *U.S. Airways, Inc. vs. Barnett*²⁴⁵ is particularly relevant in this regard. According to Judge Breyer, who delivered the opinion of the court, any modification or adjustment is reasonable, if it seems reasonable on its “face.”²⁴⁶ Further, any measure that is deployed must meet the needs of the LWDs. This rule seeks to ensure a LWD is granted an equal opportunity to enjoy the benefits and privileges of education that those without disability enjoy.

Extra caution needs to be taken to ensure the phrase “reasonable accommodation” is not misused. An academic institution can invoke this rule as a defense through arguing that the measures proposed to be adopted are disproportionate and/or could cause undue burden. The onus of proof is on the institution to prove the difficulties it will experience.²⁴⁷ The standard of proof is that of a balance of probabilities. For this defense to hold, the university’s arguments must be credible. The latitude granted to institutions, as Justice La Forest of the Canadian Supreme Court emphasized in *Eldridge v. Attorney General of British Columbia*,²⁴⁸ is not “infinite.”²⁴⁹ On the contrary, universities must demonstrate that the measures taken “infringe the rights in question no more than is reasonably necessary to achieve their goals.”²⁵⁰ Hence, a cost-benefit analysis of the initiatives proposed must be undertaken. Leticia Martel adds that we need to question whether the measures required pose risks to safety, health and well-being of others.²⁵¹ An additional factor in deciding whether a measure is reasonable is the recourse the university has undertaken²⁵² to meet the specific needs of LWDs. These are pivotal matters that must be taken into consideration. The Australian (Commonwealth) Disability Discrimination Act of 1992 (DDA) contains a checklist of factors one should consider for purposes of assessing if a particular adjustment imposes undue hardship or burden on an institution. These include:

- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- (b) the effect of the disability of any person concerned;
- (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the [university]; and

245. *U.S. Airways, Inc.*, *supra* note 233.

246. *Id.* at 402.

247. *See* Evidence Act, *supra* note 172, § 107.

248. *Eldridge v. British Columbia* (1998) 1 LRC 385.

249. *Id.* at 385.

250. *Id.*

251. Leticia Martel, *Reasonable Accommodation: The New Concept from an Inclusive Constitutional Perspective*, 8 INT’L J. HUM. RTS. 85, 104 (2011).

252. Crock et al., *supra* note 184, at 749.

(d) the availability of financial and other assistance to the [university].²⁵³

A similar list of factors is found in section 12111 of the Americans With Disabilities Act of 1990 (ADA).²⁵⁴ While these statutes are not binding in Kenya, this list is instructive on matters that need to be taken into consideration when assessing the disproportionate and/or undue hardship/burden defense. Multiple factors need to be taken into consideration. The criteria that the ADA and DDA outline travel beyond economic concerns. Satisfying the test requires one to balance “the respective rights and interests of the parties.”²⁵⁵

Measures that are unable to respond to the needs of LWDs fail the reasonableness test. Compliance requires universities in Kenya to recognize this basic rule. As mentioned above, concrete, not superficial, measures must be taken. But LWDs must also take charge of affairs in institutions. They should not shy away from highlighting to the authorities and other concerned parties instances where their rights have been infringed. They should also propose measures that could be taken to remedy these breaches. In order to bear fruit these efforts must be sustained. Some of the universities surveyed failed to meet the legal

253. See *Disability Discrimination Act 1992* (Cth) s 11 (Austl). The legislation uses the terms “unjustifiable hardship.”

254. According to legislation, the factors to be considered in determining whether an accommodation would impose undue hardship include:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111 (2018).

255. Lee Bassar & Melinda Jones, *The Disability Discrimination Act 1992 (CTH): A Three-Dimensional Approach to Operationalising Human Rights*, 26 MELB. U. L. REV. 254, 271 (2002).

requirements on inclusive education. They still discriminate against LWDs. Christopher of CUEA's experience demonstrates this:

Most offices do not have ramps. Since my impairment is not so severe, I have gone to the offices of the Dean and the Vice Chancellor Academics. I asked my friends to help me up the stairs just to complain about the state of inaccessibility in the whole University. That was two years ago but nothing has been done.²⁵⁶

The Preamble to the CRPD provides that LWDs should be actively involved in decision making processes about policies, plans and programs that have an impact on their lives and livelihoods.²⁵⁷ One way of championing LWDs rights is by representation in student organizations and the University Council—the governing body of a University.²⁵⁸ According to Gilbert: “We need representation in the Student Organization of Nairobi University to champion our rights.”²⁵⁹ Sarah of UoN supported this position: “LWDs in the universities need one of them to fight for them.”²⁶⁰ Critics have affirmed this thesis.²⁶¹ The proposal to have individuals in University Management Councils who are aware of specific needs of LWDs is a sound one. These individuals can champion the cause of LWDs. These individuals should identify specific needs as well as stress the urgency and preference of issues requiring resource allocation. Representation in student organizations is a step in the right direction.

In order to keep breaches to an all-time low, a proper complaints mechanism must be adopted and implemented by universities.²⁶² Melissa Tyler contends that having a proper system in place can contribute towards the elimination of discrimination against LWDs.²⁶³ For instance, the Directorate of Disability Services at KU deals with cases of

256. Interview with Christopher, *supra* note 51.

257. CRPD, *supra* note 12, pmb. ¶ f.

258. University of Nairobi Act (2012) Cap. 210 § 2 (Kenya).

259. Interview with Gilbert, *supra* note 70.

260. Interview with Sarah, University Official (August 21, 2013).

261. See, e.g., William Peace, *Parenting and Disability: The Final Frontier*, 5 HOUS. L. REV. 101, 108 (2015) (noting “We need qualified people with disabilities in positions of power. Only then can we stop well-meaning people who have no conception of disability rights and history from trying to provide a reasonable accommodation for those suffering from a disability.”).

262. See V.C.K. Doku et al., *Implementing the Mental Health Act in Ghana: Any Challenges Ahead?*, 46 GHANA MED. J. 241,244 (2012) (advocating for a “robust grievance and complaints” process).

263. Melissa Tyler, *The Disability Discrimination Act 1992: Genesis, Drafting and Prospects*, 19 MELB. UNIV. L. REV. 211, 225 (1993).

accommodation and general welfare for LWDs.²⁶⁴ Students at other universities, unfortunately, expressed their frustrations when dealing with Administration. Christopher of CUEA, for example, stated, “On the issue of extra time during exams, I have even gone to the Dean and he just referred me to higher offices.”²⁶⁵ A proper procedural framework must be in place to ensure LWDs enjoy their rights, while at the same time are having their needs met. In the absence of a working structure, it may be a challenge for the right of inclusive education to be enforced.²⁶⁶

CONCLUSION: TOWARDS INCLUSION

The norm of inclusive education, as this article has demonstrated, is fundamental to LWDs.²⁶⁷ Universities have an obligation to ensure that this basic right is enjoyed by LWDs at all times.²⁶⁸ However, in reality, the situation is quite different. While some universities in Kenya were compliant with the legal requirements, others still had a long way to go.²⁶⁹ The latter institutions need to take more solid steps to meet the obligations owed to LWDs. This article has outlined some specific steps that could be taken. In order for these institutions to fulfill their legal mandate, these measures must be followed through completely.²⁷⁰

Although the right of inclusion, non-discrimination, and equality are protected by international and domestic laws, there is no specific legislation that protects the rights of LWDs at universities in Kenya. Thus, the first step would be to create a robust legal framework.²⁷¹ Among

264. See Disability Policies and Procedures of Kenyatta University, cl. 9.7 (2014), <http://www.ku.ac.ke/disabilityservices/images/stories/docs/Disability-Policy.pdf> (Oct. 11, 2020).

265. Interview with Christopher, *supra* note 51.

266. See John Charema, *Inclusive Education in Developing Countries in the Sub Saharan Africa: From Theory to Practice*, 25 INT’L J. OF SPECIAL EDUC. 87 (2010); Lucyline Murungi, *Inclusive Basic Education in South Africa: Issues in its Conceptualisation and Implementation*, 18 POTCHEFSTROOM ELEC. L. J. 3160 (2015).

267. See PDA, *supra* note 24, § 18; see also CRPD, *supra* note 12, art. 24.

268. See *Universities Act*, *supra* note 25, pmbl. (stating the Act was passed ‘to make better provisions for the advancement of university education in Kenya’).

269. See the discussion in section 3 of this article.

270. See generally Chalwe & Desleighde, *supra* note 152; Eleweke, *supra* note 228; Akinyi, *supra* note 227.

271. See Vitor Teixeira et al., *Placement, Inclusion, Law, and Teachers’ Perceptions in Macao’s Schools*, 22 INT’L J. INCLUSIVE EDUC. 1, 15 (2017) (underscoring the value of “formal acceptance and implementation of the [Decree] Law”); Christopher Johnstone & Davies Chapman, *Contributions and Constraints to the Implementation of Inclusive Education in Lesotho*, 56 INT’L J.

other aspects, the framework should flesh out concepts such as discrimination and reasonable accommodations in the context of universities.²⁷² These standards should cover, at a minimum, enforcement mechanisms, physical access and economic access or affordability.²⁷³ They should also reinforce the international and local frameworks by expressly forbidding discrimination against LWDs at universities.²⁷⁴ Membership to international treaties is also a valuable step in the protection of LWDs.²⁷⁵ It is unfortunate that Kenya has yet to sign on to the 2018 African Protocol on the Rights of Persons with Disabilities (Disability Protocol).²⁷⁶ Regional instruments such as these contain useful provisions, which could be used to set standards as well as monitor compliance at the domestic level.²⁷⁷

As noted above, the Kenyan Building Code was promulgated in 1968 and a lot has changed in the building industry since then. Under the current legal regime, owners of buildings have a legal obligation to all users.²⁷⁸ They must ensure that all spaces are accessible.²⁷⁹ Unfortunately, few would deny that this code should be amended in accord with the current constitutional framework. Although Kenya has promulgated a disability-specific legislation and a progressive constitution in 2003 and 2010, respectively, it is unfortunate that this code still exists in its current form.

However, passage of specific legislation, and disability policies, or amending existing laws or signing international instruments are by themselves insufficient.²⁸⁰ For universities to fulfill their obligations, the

DISABILITY, DEV. & EDUC. 131, 144 (2009) (calling on law to support the policy framework).

272. *See, e.g.*, Persons with Disabilities Act, *supra* note 13, § 3; Disability Act, 2012, § 2 (Malawi).

273. *See, e.g.*, Disabled Persons Act, 1992, §§ 5, 7 & 8 (Zimbabwe).

274. *See, e.g.*, Uganda Institute of Special Education Act, 1998, § 4 (outlining the objects of the legislation to include, catering “for all kinds of persons with disabilities”).

275. *See* KENYA CONST. art. 2(6) (noting “any treaty or convention ratified by Kenya shall form part of the law of Kenya”).

276. Protocol to the African Charter, Jan. 29, 2019, *supra* note 11.

277. This treaty has several useful provisions. First, it defines crucial terms, such as “universal design” and “discrimination on the basis of disability.” *Id.* § 2. It also outlaws harmful practices meted out against LWDs. *Id.* art. 11. Further, it outlines the duties of LWDs. *Id.* art. 31. Moreover, special provisions are made for women and girls (article 27), children (article 28), older persons (article 30) and youth (article 29). *See id.* art. 27, 28, 29, & 30.

278. *See* PDA, *supra* note 24, §§ 21, 22.

279. *Id.*

280. *See generally* Ndukuyakhe Ndlovu, *Legislation as an Instrument in South African Heritage Management: Is it Effective?*, 13 CONSERVATION & MGMT.

promises contained in this corpus of law must be transformed into real rights.²⁸¹ Here lies the challenge. Political will and allocation of sufficient resources by duty bearers are key components of the implementation matrix.²⁸² In their absence, it will be difficult for any institution to surmount the barriers erected by the physical environment.

Kenya's legal framework recognizes the fact that all institutions will not always fulfill their constitutional mandate.²⁸³ In order to check these infractions, the PDA contains a raft of measures that could be used, and non-compliance under this framework is taken seriously.²⁸⁴ Hence, the Act mandates the National Council of Persons with Disabilities (the Council) to police compliance levels within institutions.²⁸⁵ If they establish that "any premises, services or amenities" within a university is inaccessible to LWDs, it can issue an adjustment order to the owner.²⁸⁶ Any order issued by the council must contain the following information:

OF ARCHAEOLOGICAL SITES 31 (2011); Wu Yuan, *The Effectiveness of the 'Ride-Bright' Legislation for Motorcycles in Singapore*, 32 ACCIDENT ANALYSIS & PREVENTION 559 (2003).

281. See Walter Osapiri Barasa v. Cabinet Secretary Ministry of Interior and National Co-Ordination [2014] eK.L.R 52 (Kenya) (Justice Mwongo stated that "[o]nce a treaty becomes part of its law, a State Party is obligated to perform the treaty").

282. See generally Francis Garaba, *Leadership and Political Will for Implementation of the Access to Info. (ATI) Act in Kenya*, 29 RECORDS MGMT. J. 117 (2019); Karim Makdisi, *Towards a Human Rights Approach to Water in Lebanon: Implementation Beyond Reform*, 23 WATER RES. DEV. 369 (2007).

283. The High Court is mandated to hear and determine cases involving violations of fundamental rights and freedoms, and hand-down, among others, the following reliefs:

- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.

See KENYA CONST. art. 23(3).

284. PDA, *supra* note 24, § 3.

285. *Id.*

286. *Id.* §§ 7, 24.

- The premises, services or amenities in issue;
- The reasons the council based its decision on;
- The recommendation action, and the fact that the owner will bear all the costs of rectifying the breach; and
- The timeframe for compliance.²⁸⁷

A person aggrieved by the decision of the council may appeal this verdict to the High Court.²⁸⁸ While this framework is useful in the context of removing barriers to accessibility, it is very problematic. In particular, the requirement that only the council has legal recourse against an errand owner of a building is concerning. Perhaps the idea behind this requirement was to curb frivolous applications against owners. Under the present framework, anyone with a complaint can only ventilate it via the council. It is this body that will then decide whether or not to take action. This procedural framework is at odds with the Kenyan Constitution. The preamble to the Constitution recognizes the aspirations of citizens to have “a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” The obligation to “respect, uphold and defend” the constitution is placed on all persons.²⁸⁹ In the context of enforcement of fundamental rights, the constitution is clear in article 22(1):

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.²⁹⁰

Requiring persons to access the rights framework via a third party is obviously discriminatory and out of the step with fundamental principles of the Constitution. Understandably the PDA was passed before the current Constitution. In keeping with the supremacy clause of the Constitution, this legislation has to be amended in order for it to align with the basic law. As of now, the current framework is arguably unconstitutional.²⁹¹ Any aggrieved person should have the right to request an owner of a building to remove any access related barriers. As the Disability Protocol underlines, justice seekers should not be discriminated against. Rather, Governments have an obligation to

287. *Id.* § 24.

288. *Id.* § 24(5).

289. *See* KENYA CONST. art. 3(1).

290. *Id.* art. 22(1).

291. *See id.* art. 2(4) (“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”).

ensure that LWDs, as any other person, “have access to justice . . . and all legal proceedings.”²⁹² A person lodging a claim for compliance must come within the four corners of the rule the Kenyan High Court set in *Anarita Karimi Njeru v. R.*²⁹³ In the words of Justice Trevelyan, an applicant is required to demonstrate “with a reasonable degree of precision that of which he [or she] complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”²⁹⁴ According to this authority, broad based claims will not work. One is required to adduce cogent evidence of the premise(s) they claim lacks access facilities.²⁹⁵ If the owner fails or complies partially, a complainant should be entitled to commence legal proceedings. Legal action is one of the routes that LWDs can engage in order to bring the changes they so deserve.

In Kiswahili they say, “Mungu hakupi kilema akakosesha mwendo.” When translated into English it means, “God does not give one a disability and, simultaneously, impede their progress.” LWDs have a lot of potential, skills, and talents. Like any other learner, they are entitled to realize their potential to the fullest extent possible. Any barrier, which would impede their advancement in life, must be instantaneously removed. As this article has demonstrated, some universities in Kenya have not yet removed these obstructions. This discriminatory environment cannot be allowed to persist. Measures that could be taken to create a level playing ground have been explored in the preceding analysis.²⁹⁶ These initiatives can go a long way towards securing the lives and livelihoods of LWDs. It is in the interest of all human rights defenders to monitor compliance by duty bearers.²⁹⁷ If they fail, there is high chance that the rights of LWDs to inclusive education will continue to be significantly compromised.

292. *See id.* art. 13(1).

293. *Anarita Karimi Njeru v. The Republic* (1979) 1 K.L.R. 162 (H.C.K) (Kenya).

294. *Id.* at 162.

295. *See Zehnalova and Zehnal v. Czech Republic*, App. No. 38621/97, 19 Eur. Ct. H.R. (2002) at 12 (“In the instant case, however, the rights relied on are too broad and indeterminate as the applicants have failed to give precise details of the alleged obstacles and have not adduced persuasive evidence of any interference . . .”).

296. *See supra* Part III.

297. *See generally* L. Chiduzwa, *The Zimbabwe Human Rights Commission: Prospects and Challenges for the Protection of Human Rights*, 19 L. DEMOCRACY & DEV. 148 (2015); Danwood Chirwa, *A Human Rights Perspective on Privatization Policy and Legislation*, 2 EAST AFR. J. PEACE & HUM. RTS. 310 (2008).